The University of Chicago

THE LEGAL BASIS OF PUBLIC SCHOOL ATTENDANCE IN THE UNITED STATES

A DISSERTATION SUBMITTED TO THE FACULTY OF THE DIVISION OF THE SOCIAL SCIENCES IN CANDIDACY FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF EDUCATION
1941

By
JOHN HARRISON HUTCHINSON

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CHAPTER I

INTRODUCTION

The several states of the United States, in providing for public education, have created school districts and have authorized or required the establishment of schools therein. In the attempt to make these schools available to the children of the state, the state legislature and the courts of each state have prescribed and defined the conditions of attendance upon such schools. Some of these conditions must be met by the pupils themselves, while others must be met by school authorities. The purpose of this study is to discover the legal principles which define these conditions as they affect public school attendance in the different states.

The legal basis of public school attendance will be defined as it relates to attendance upon all public schools which are supported by public funds in school districts created under the legal provisions of the states. The conditions determining the legal basis of public school attendance as defined in this study are age, health, mental ability, scholarship, race and color, residence, transfer, transportation, indigency, and fees.

An analysis will be made of the constitutions and statutes of each state with regard to the conditions of public school attendance as set forth above. Likewise, an analysis will be made of the decisions of the courts of last resort in the different states in order to determine the common law principles and statutory interpretations which aid in defining the legal basis of public school attendance. Such legal basis will be defined as of January 1, 1940.

CHAPTER II

THE LEGAL AGE REQUIREMENTS FOR PUBLIC SCHOOL ATTENDANCE

The age-group to be served is one of the first considerations of those who plan the different units of the public school system. The legal provisions by which public schools are established in the various states furnish evidence of this concern over age. Every state in the union with one exception defines by statute, either the age-group for which public schools are provided, or the group included in the school census. Likewise, many state constitutions define the limits of school age, and considerable litigation has been carried on in the courts on the same subject. An analysis of these provisions and interpretations will reveal the ways in which age affects school attendance

School Age as Defined by State Constitutions

As a rule the states do not fix, by constitutional provision, the minimum and maximum ages of children for whom public education is provided. Only eighteen of them do so. A large majority of states have been more general in their provisions, adopting constitutions containing mandates to the legislatures to provide for the maintenance and support of a system of free common schools for "all the children of the state" without stipulating any age limits. This would seem to be the better practice, since the legislature is then free to change the age limits to fit new situations as they arise without waiting for such power to be granted through the process of constitutional amendment.

The minimum and maximum ages in the eighteen states which define school-age by constitutional provision are revealed in Table 1. While minimum ages range from four to seven years, six is the age found most frequently. Although three states have a minimum of five years and two a minimum of four years, in none of these is there any mention of kindergartens.

The maximum ages fixed by constitutional provision varies

TABLE 1

MAXIMUM AND MINIMUM SCHOOL AGE AS FIXED BY CONSTITUTIONAL PROVISION

State	School Age		State	School Age	
	Min.	Max.		Min.	Max.
Alabama	7	21	Nebraska	5	21
Arkansas	6	21	New Jersey	5	18
Arizona	6	21	N. Carolina	6	21
Colorado	6	21	Oregon	4	20
Kansas	5	21	Pennsylvania	6	..
Louisiana	6	18	S. Carolina	6	21
Mississippi	5	21	Virginia	7	20
Missouri	6	20	Wisconsin	4	20
Montana	6	21	Wyoming	6	21

from eighteen in two states to twenty-one in eight of the eighteen states making such provisions. This range of three years is exactly the same as the range in the minimum age. Invariably these provisions are stated in terms that are somewhat ambiguous. They make the schools available to children of the state between the minimum and maximum ages, for example, between seven and twenty-one years. The question may arise whether a pupil may attend school while twenty-one years of age or must leave when he reaches his twenty-first birthday.

Age as Defined by Statutory Enactment

Each of the forty-eight states has enacted legislation defining the age-group for which public schools are to be provided or the age-group included in the school census. In this discussion it is assumed that where the statute requires children of a certain age to be enumerated in the school census, children in this age-group are entitled to school attendance. The minimum and maximum ages as defined by such legislation are listed in Table 2.

Minimum Age for School Attendance

A large majority of the states, thirty-five of them, stipulate six years as the minimum age at which children may be admitted to the public schools. Only ten states fix the minimum age

TABLE 2

AGES AT WHICH PUPILS ARE ENTITLED BY STATUTE TO ATTEND PUBLIC SCHOOLS AND KINDERGARTENS

State	School Age		Kindergarten Age		State	School Age		Kindergarten Age	
	Min.	Max.	Min.	Max.		Min.	Max.	Min.	Max.
Alabama	6	21	5	8	Nebraska	5[b]	21[b]	..[b]	..[b]
Arizona	6	21	5	..	Nevada	6[b]	21[b]	4[b]	6[b]
Arkansas	6	21	..	..	New Hampshire	5[b]	16[b]	..	..
California	6	21	5	..	New Jersey	5[b]	20[b]	4	5
Colorado	6[a]	21	3	6	New Mexico	5[b]	21[b]	5[d]	6
Connecticut	6[a]	16	4	7	New York	5	21	4[d]	6
Delaware	6	21	..	..	N. Carolina	6	21	..	6
Florida	6[b]	21[b]	4	6	N. Dakota	6	21	..	6
Georgia	6[b]	18[b]	..	..	Ohio	6	21	..[e]	..
Idaho	6[b]	21[b]	3	6	Oklahoma	6	21	4[e]	6
Indiana	6	21	4	6	Oregon	6	21	4	6
Illinois	6	21	4	6	Pennsylvania	6[b]	21[b]	..	..
Iowa	5	21	..	..	Rhode Island	4[b]	21[b]	..	..
Kansas	6	21	4	6	S. Carolina	6	21	4	..
Kentucky	6[b]	18[b]	4[c]	6[c]	S. Dakota	6[b]	21[b]	..	..
Louisiana	6[b]	18[b]	4[c]	6[c]	Tennessee	6[b]	18[b]	..	..
Maine	5[b]	21[b]	4	6	Texas	6	21	5[f]	..[f]
Maryland	5[b]	18[b]	..	..	Utah	6	18[g]	4[f]	6[f]
Massachusetts	5[b]	16[b]	..	..	Vermont	6	18[g]	..	..[h]
Michigan	5[b]	20[b]	4	7	Virginia	7	20	..	6[h]
Minnesota	5	21	4	6	Washington	6[b]	21[b]	4	6
Mississippi	6	21	..	..	W. Virginia	6[b]	16[b]	4	6
Missouri	6	20	..	..	Wisconsin	4	20	4	6
Montana	6	21	3	6	Wyoming	6	21	4	6

[a] Five when no kindergarten.

[b] Basis of enumeration in school census.

[c] According to constitution.

[d] Board may fix higher minimum age.

[e] In district of 2,500 or more.

[f] Districts with total population of 2,000 or more.

[g] Pupils 18 years of age not deprived of advantage of school on account of age.

[h] May be admitted at six years of age.

at five years and only two at four years. There is but one state with seven as the minimum age, and it provides that children six years of age may be admitted to the primary grades of the school without stating any further restrictions governing such attendance.

Admission of beginners.--Obviously, many children will reach the minimum age after the opening of a school term. Several states have endeavored to set, through legislative enactment, the date after the opening of school on which beginning pupils must reach the minimum age in order to be admitted to the school for that term, and to fix a period of time following the opening of any school term for the admission of beginning pupils. Table 3 contains a summary of these provisions.

TABLE 3

PERIOD OF ENTRANCE FOR BEGINNERS AND TIME OF ATTAINING MINIMUM SCHOOL AGE

State	Period of Entrance	Time of Attaining Minimum Age after Opening of School	
		First Term	Second Term
Alabama	....	October 1	February 1
California	First month	6 months	3 months
Kansas	....	January 1	....
Kentucky	....	September 30	February 28
New Jersey	First 10 days[a]	....	....
N. Carolina	1 month	October 1	....
Oregon	First 4 weeks	November 15	March 15
Pennsylvania	2 weeks	Before January 1	Before close of term
S. Dakota	....	October 1	....
Vermont	....	January 1	....

[a]School board authorized to fix other periods.

It is evident from the data presented that not many of the states have attempted to define explicitly, by statute, either the period of entrance for beginning pupils or the time of their attaining the minimum age after the opening of the school term. There is little uniformity among these states in such specific provisions. The period of time after the opening of a school term during which a beginning pupil may enter is as low as ten days in one state and in no case longer than one month. The two states with the shortest period empower their school boards to admit pupils at other times.

The variation in the dates on which pupils must reach the minimum age to be admitted to school in any year or term is comparatively large, ranging from the thirtieth day of September to

six months beyond the opening date of school. Typically the range is from October first to January first. Only one state listed in Table 3 admits pupils at the beginning of a term on the condition that they attain the minimum age by the end of that school term. The date for meeting the age requirement is usually earlier in the school term.

The wisdom of enacting such detailed legislation may be questioned. Some states make definite provisions empowering school boards to make all needful rules and regulations for the admission of beginning pupils.[1] This is probably a wiser type of provision since it allows variation in practice to meet the conditions in any particular community.

Minimum age for kindergarten attendance.--The picture of minimum age as defined by statute is not complete without taking into account the ages for which kindergartens may be established. The typical minimum age for admission to kindergarten is four years, the requirement in eighteen states.[2] Four states have a minimum age of five years and three states have three years. Five states provide kindergartens for children "under six." As a rule, the minimum kindergarten age is two years below the legal minimum age for entrance into the primary grades. There are two states, however, in which these ages are identical and seven states in which the difference is only one year. The greatest difference is three years, found in four different states.

It should not be understood that all children in the states in which definite ages have been established for kindergarten attendance are entitled to kindergarten privileges in the school districts in which they reside. Very often there are certain conditions which must be met before a school corporation may establish a kindergarten.[3]

---

[1] Supplement to Arizona Revised Code, 1936, chap. 21, sec. 1030. Minnesota Statutes, 1927, chap. 14, sec. 2741. Ohio Code Annotated, 1936, sec. 7681.

[2] See Table 2.

[3] Illinois Revised Statutes, 1939, chap. 122, sec. 123. Compiled General Laws of Florida, Permanent Supplement, 1940 Part, Vol. I, sec. 892 (33)(2). Nevada Compiled Laws, 1929, sec. 6026. 1938 Supplement to New Mexico Statutes Annotated, sec. 1425.

Maximum Age for School Attendance

The typical age at which pupils may be denied admission to public school is twenty-one years. Such is the maximum age in thirty-two states.[1] Fifteen states fix the maximum age below twenty-one years, five at twenty, seven at eighteen, and three at sixteen. One state mentions no maximum age.

Some states have anticipated irregularities which are likely to arise with regard to the maximum age. South Carolina statutes provide that when a pupil is in the graduating class and becomes twenty-one years of age before graduation, he is permitted to complete the term.[2] In Oklahoma, any person between the ages of twenty-one and twenty-five may attend school for a length of time after he reaches twenty-one, equal to the length of time he was unable to attend, because of physical disability, before becoming twenty-one.[3]

Without stating the conditions, South Dakota permits persons over the maximum age to attend school without payment of tuition.[4] Similar provisions have been made in five other states.[5] In Iowa, honorably discharged soldiers, sailors, and marines, residents of the state, may attend school free of tuition charge for as many months after becoming twenty-one as they spent in the military or naval service before they became twenty-one years of age.[6] Illiterates may attend beyond the maximum age in North Carolina.[7]

It is apparent from the above regulations that some states are often reluctant to set an arbitrary maximum age beyond which pupils are no longer entitled to the privileges of the public

---

[1] See Table 2.

[2] 1936 Supplement to Code of Laws of S. Carolina, sec. 5404.

[3] Oklahoma Session Laws of 1939, chap. 34, sec. 1.

[4] S. Dakota Code of 1939, Vol. I, sec. 15.3004, p. 740.

[5] Wisconsin Statutes, 1937, sec. 40.21(4), p. 514. Revised Statutes of the State of Missouri, 1929, sec. 9213, p. 2544. Compiled Statutes of Nebraska, 1929, chap. 79, sec. 2602. Revised Statutes of New Jersey, 1937, 18:14-1, p. 91. Annotated Code of Tennessee, 1934, chap. 2473, p. 599.

[6] Code of Iowa, 1939, sec. 4273.

[7] The North Carolina Code of 1935, sec. 5449, p. 1883.

schools. In light of the newer conception of education and the emphasis on adult education such flexibility is to be desired.

Court Decisions Relating to Age

Validity of statutes defining school age.--There are few decisions relating to the ages at which children may attend the public schools. As pointed out above, such ages are usually fixed by statute. The question has arisen as to whether state legislatures have the power to provide schools for children whose ages are above the maximum or below the minimum specified by state constitutions. In New Jersey, where the state constitution provides that a school system free of tuition charge shall be provided for all children of the state between the ages of five and eighteen years, the legislature enacted a law whereby free instruction is provided for all children between the ages of five and twenty. The court, in finding the statute to be valid, held that the constitutional provision did not preclude the legislature from providing for the education of pupils between the ages of five and twenty years since this was only doing more than the constitution required.[1]

Similarly, in Colorado, the legislature obtained an opinion from the supreme court of the state as to its power to establish kindergartens for children under six years of age, the minimum age fixed by the state constitution. The court stated the rule of construction as applied to the constitution of that state, to the effect that the court would not determine whether any legislative enactment were authorized but would inquire only as to whether it was prohibited by the constitution.[2] In keeping with this general principle the court said:

> Unless, therefore, the constitution, in express terms or by necessary implication, limits it, the legislature may exercise its sovereign power in any way that, in its judgment, will best subserve the general welfare. Read in the light of this rule of interpretation, and the wise and liberal policy of the state in educational matters, the section is clearly mandatory, and requires affirmative action on the part of the legislature to the extent and in the manner specified, and is in no measure prohibitory or a limitation of its power to provide free schools for children under six years of age, whenever it deems it wise and beneficial to do so.

---

[1] In re Newark School Board, 70 A. 881 (1907).

[2] In re Kindergarten Schools, 18 Colo. 234, 32 Pac. 422, 19 L.R.A. 469 (1893).

The same principle was applied in the reasoning of the Wisconsin court in upholding the validity of a statute which provided for the establishment of vocational high schools for people over fourteen, although the constitution defined school age between four and twenty years.[1]

It appears to be established, therefore, that the provisions of state constitutions fixing the minimum and maximum ages of children for whom schools are to be provided, are mandatory only in furnishing education for the age-group designated, and are not construed as limitations nor prohibitions upon legislatures in enacting legislation providing for the education of children above or below the ages stated in constitutions.

Powers of school boards to prescribe age for school attendance.--While state legislatures have the power to enact legislation providing schools for children below and above the ages prescribed in state constitutions, it has been held that school authorities have no power, without legislative authority, to admit to the public schools and provide instruction free of charge to any child below the constitutional minimum age.[2]

In a few instances the question has arisen as to whether school authorities have the power or authority to make rules or regulations, in the absence of specific statutory authority, denying the children who become of school age during the school year, the right to enter school immediately thereafter. In other words, may school boards, under the general statutory power to make regulations for the admission of pupils into the schools, in effect, deny children who have actually reached the statutory minimum age, admission to school until a certain date prescribed by such board?

There is no jurisdiction which denies that school boards have such power, but in each case the court insists that the rule must be reasonable. The whole matter, therefore, turns upon the question of what constitutes reasonableness in such rules. In a case where a statute provided that school boards should establish and keep in operation a sufficient number of free schools for the accommodation of all the children in the district over the age of six and under twenty-one years and secure for all such children

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[1] City of Manitowoc v. Town of Manitowoc Rapids, 285 N.W. 403 (1939).

[2] Roach v. Board of Directors, 77 Mo. 484 (1883).

the right and opportunity to an equal education, it was held that a rule requiring pupils to be six years of age on or before September first for the first term, or April first for the second term, in order to be admitted to the schools of the district for that school year, was unreasonable. In so holding the court said:

> We are of the opinion that the rule which caused appellee's child, who arrived at school age only thirty-one days after the fall term commenced, to lose the benefits of the free school, not only during the remaining months of that term, but also the whole of the following winter term, was not a reasonable one or calculated to promote the objects of the law.[1]

A similar rule has been held by the Massachusetts court to be reasonable.[2] A certain school committee made a rule to the effect that children under the age of seven could not enter school except at the beginning of the fall term or within three or four weeks thereafter unless qualified to enter classes existing in the school at the time of entry. A statute permitted but did not compel the attendance of children under seven. In discussing the reasonableness of the rule the court held:

> This was a reasonable rule. . . . . Grading is a permitted if not an essential feature of the public school system. The introduction, late in the year, of a very young scholar not qualified to enter the existing classes, would prevent the other scholars from obtaining such advancement in learning and in training as would enable them to proceed with their education in due course.[3]

Since so few of the states have defined by statute this type of situation which will undoubtedly arise in many schools, decisions of courts upholding reasonable rules of boards of education are probably wise. There appears to be no case testing the validity of such regulations when made by state legislatures.

---

[1] Board of Education v. Bolton, 85 Ill. App. 92 (1899).

[2] Alvord v. Inhabitants of Town of Chester, 180 Mass. 20, 61 N.E. 263 (1901).

[3] Alvord v. Inhabitants of Town of Chester, 180 Mass. 20, 61 N.E. 263 (1901).

CHAPTER III

HEALTH AS A CONDITION TO PUBLIC SCHOOL ATTENDANCE

Statutory Provisions

It has long been recognized that health is an important factor in the life of any people. Equally well recognized is the fact that the maintenance and preservation of health depend upon the prevention of the spreading of communicable and infectious diseases, especially among children and youth. In all probability there is no where a clearer expression of the appreciation of these facts than that expressed by the several states in their statutes concerning health as it affects school attendance. Aware of the rapidity with which diseases spread among school children, state legislatures have defined by statutory enactment, the conditions of health which must be met by those who desire to attend school. The validity of such statutes as well as their interpretation has been given consideration by the courts.

Attendance of Pupils Affected with or Exposed to Communicable Diseases

Public school attendance as affected by contagious and infectious diseases has been dealt with in the statutes in more than three-fourths of the states. These statutes vary, some of them providing a general delegation of power to school authorities for the protection of the health of school pupils, others providing specifically for the exclusion of pupils affected with or exposed to contagious or infectious diseases, and still others naming the specific diseases for which pupils may be excluded from school. Since the statutes in the first classification mentioned above do not directly deal with school attendance, they will not be dealt with in this study.

Of the statutes which deal directly with health as it affects school attendance, those which provide explicitly that pupils may be excluded when suffering from or exposed to an infectious or a contagious disease, are the most numerous. As revealed

TABLE 4

STATUTES CONCERNING COMMUNICABLE DISEASES AS THEY AFFECT PUBLIC SCHOOL ATTENDANCE

State	Conditions of Exclusion		Power of Exclusion		Terms of Reinstatement
	Affected with Disease	Exposed to Disease	School Authorities	Health Authorities	
Arizona.....	x	...	x	...	a,b
California.....	x	x	x	...	...
Connecticut....	x	...	x	x	a
Delaware.....	x	x	x	...	...
Florida.....	...	...	...	...	a,c
Idaho.....	...	x	x	...	c
Indiana.....	x	x	x	...	a
Kansas.....	x	x	...	...	...
Kentucky.....	...	x	x	...	a,b
Louisiana.....	x	...	x	...	...
Maine.....	x	x	x	...	a,c
Maryland.....	x	...	...	x	a
Massachusetts..	x	x	x	...	a,c
Mississippi....	x	...	x	...	...
Missouri.....	x	x	x	...	c
Nebraska.....	x	...	x	...	...
Nevada.....	...	x	x	x	a
New Hampshire..	x	x	...	...	...
New Jersey.....	x	x	x	...	a,c
New York.....	x	...	x	...	a,c
North Dakota...	x	x	x	...	a
Ohio.....	...	x	x	...	a
Oregon.....	x	x	x	x	c
Pennsylvania...	x	x	x	x	c
South Carolina.	...	x	x	...	c
Tennessee.....	x	...	x	...	c
Texas.....	x	x	x	...	a,c
Utah.....	x	x	...	x	...
Vermont.....	x	...	x	...	...
Virginia.....	x	...	...	...	...
Washington.....	x	x	...	...	c
West Virginia..	x	x	...	...	a
Wisconsin.....	...	x	x	x	a

a- Permit by health authorities.
b- Permission of school authorities.
c- Certificate from competent physician.

in Table 4, there is a high degree of uniformity among the various states. Generally, the condition for exclusion is either the suffering from or the exposure to a disease, and in most instances it is both. There is a difference, however, in the terms in which

the conditions are stated. In some cases the condition is described in general terms. For example, a statute may provide that, "no pupil affected with any contagious disease shall be allowed to attend any common school or remain in any schoolroom while so infected."[1] On the other hand, the condition may be described more specifically by naming some of the diseases. A North Dakota statute is illustrative of this type. It provides:

> No principal, superintendent or teacher of any school, and no parent or guardian of any minor child, shall permit any child having scarlet fever, diphtheria, smallpox, whooping cough, measles or any other dangerous, infectious or contagious disease, or any child residing in any house in which any such disease exists or has recently existed to attend any public or private school until the local board of health shall have given permission therefor.[2]

There is also considerable uniformity among the states in designating the authorities who have the power to exclude pupils. In general, such power is delegated to the local school authorities or to such authorities acting in conjunction with boards of health. There are very few states which give full authority for exclusion to health officials. While school authorities usually have the power to exclude pupils affected with or exposed to a contagious disease, very often they may act only on the advice of a physician[3] or of a health officer.[4] It should not be overlooked, however, that a large majority of the statutes contain no provision compelling or even suggesting that school authorities act on the advice from any medical source.

Very different are the conditions under which pupils may be reinstated after having been excluded from school. With but few exceptions, such pupils are admitted again only upon the advice of some medical authority, either a practicing physician or the board of health. Typical of such requirements is the Massachusetts statute which provides that, "a child returning to school after having been absent on account of such infection or exposure shall present a certificate from the board of health or

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[1] General Statutes of Kansas, 1935, chap. 72, sec. 1109.

[2] Compiled Laws of North Dakota, 1913, sec. 426.

[3] Code of Maryland, 1924, Vol. II, Art. 77, sec. 123. Revised Statutes of Missouri, 1929, chap. 57, sec. 9208.

[4] See Table 4.

its duly appointed agent that the danger of conveying such disease by such child is passed. . . . ."[1]

Statutes of the third type mentioned above, those in which specific diseases are designated, are found only in the states in which there is provision for exclusion on the basis of contagious diseases. They are administered in the same manner as those statutes which use only the general term, "contagious or infectious" diseases, except where immunization to the disease is made a condition precedent to school attendance. Since immunization to specific diseases is made such a condition in more than one-half of the states, it will be given separate attention in the section which follows.

Immunization as a Prerequisite to School Attendance

While there are many contagious and infectious diseases for which pupils may be excluded from school when affected with or exposed to them, there are only two such diseases for which immunization may be required as a condition precedent to school attendance. This is probably due to the fact that for very few of these diseases is there any generally approved method of immunization. The two diseases named in the statutes are smallpox and diphtheria.

Vaccination against smallpox.--Most of the states have dealt specifically with vaccination against smallpox and many of them have made it a condition to public school attendance. These conditions as defined by statute vary among the different states and are summarized in Table 5.

Vaccination required in absence of an epidemic.--Several states require by statute that school or health authorities shall require each child to be vaccinated before being permitted to attend a public school. The statutes making such requirement vary in comprehensiveness. Some apparently attempt to provide for the different contingencies which are likely to arise in their administration. A New Hampshire statute illustrates this type.

> No child shall attend a public or private school in this state unless he has been vaccinated; or has had the smallpox; or has submitted not less than three times to the process of vaccination; or holds a certificate of the local board of

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[1] Acts and Resolves of General Court of Massachusetts, 1938, chap. 265, sec. 2, p. 230.

health that he is an unfit subject for vaccination. The local board of health shall issue such a certificate on the advice of a registered physician of the state and practicing in the town in which the child resides.[1]

TABLE 5

STATUTES CONCERNING VACCINATION AS A CONDITION TO PUBLIC SCHOOL ATTENDANCE

State	Required in Absence of Epidemic	Authorized		Prohibited
		Absence of Epidemic	Presence of Epidemic	
Arizona	...	...	x	...
Connecticut	...	x	...	...
Georgia	...	x	...	...
Indiana	...	...	x	...
Iowa	...	...	x	...
Maine	...	x	...	...
Maryland	x	...	...	...
Massachusetts	x	...	...	...
Minnesota	...	...	x	...
Montana	...	...	x	...
New Hampshire	x	...	...	...
New Jersey	...	x	...	...
New York	x[a]	...	x	...
New Mexico	x	...	...	...
North Carolina	...	...	x	...
North Dakota	...	...	...	x
Oregon	...	x	...	...
Pennsylvania	x	...	...	...
Rhode Island	x	...	...	...
South Carolina	x	...	...	...
South Dakota	...	x	...	x[b]
Texas	...	x	...	...
Utah	...	...	...	x
Virginia	x	x	x	...
West Virginia	x	...	...	...
Wisconsin	...	...	x	...

[a] In cities of 50,000 or more inhabitants.

[b] No compulsion by physical force.

A different type of provision is found in the New Mexico statute which specifies that, "it shall be unlawful for any child to attend school or for any teacher to allow such child within any

[1] Laws of State of New Hampshire, January Session, 1929, chap. 139, sec. 1, pp. 165 f.

schoolhouse"[1] unless vaccinated. The most concise statement of a statute defining the requirement of vaccination is in Maryland. It merely provides that "every child before being admitted to any public school shall produce a certificate from a regular physician that he has been properly vaccinated."[2]

Vaccination authorized.--Some states have not made the absolute requirement in their statutes that pupils not immune from smallpox must be denied the right to attend the public schools, but have delegated the power to make such requirement to certain school or health officials.[3] Such officials have been granted the power in some states to require immunity from smallpox even though there is no epidemic of the disease in the school community. In other states there is a restriction on this power, which limits those exercising it to requiring vaccination as a condition to school attendance when smallpox is prevalent or when an outbreak of the disease may be reasonably apprehended in the community in which the school is located.

Exemption from vaccination.--There are conditions, however, under which pupils may be exempted from the requirements of vaccination. One such exemption is based on the refusal of the parent or guardian to consent to the vaccination.[4] If, however, there is an epidemic of smallpox in the school district where the exempted pupil resides, such pupil may be denied the privilege of the school unless he is vaccinated.[5] Another type of exemption is based on the physical condition of the child. Where vaccination is a condition necessary for school attendance, any pupil who submits a certificate from a licensed physician that vaccination would likely be injurious to his health, may be permitted to attend school without being vaccinated.[6]

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[1] 1938 Supplement to New Mexico Statutes, 1929, chap. 110, sec. 348 (8).

[2] Code of Maryland, 1924, Vol. II, Art. 77, sec. 117.

[3] See Table 5.

[4] Revised Statutes of Washington, 1931, sec. 4805.

[5] Revised Statutes of State of Maine, 1930, sec. 44 (V), p. 360. Revised Code of Arizona, 1928, chap. 61, sec. 2693.

[6] General Laws of Massachusetts, 1932, chap. 111, sec. 183. 1938 Supplement to New Mexico Statutes, 1929, chap. 110, sec. 348 (10). Rhode Island General Laws, 1938, sec. 8, p. 345. Laws of

Vaccination prohibited.--While vaccination is required by statute as a condition precedent to school attendance in some states, in two states at least, it is, by statute, prohibited. One of the states, North Dakota, provides that, "no form of vaccination or innoculation shall hereafter be made a condition precedent, in this state for the admission to any public or private school or college, ..."[1] The Utah statute not only prohibits the making of vaccination a condition precedent to school attendance but prohibits its being required under any circumstances. In addition to a provision almost identical with the North Dakota statute, the Utah statute provides that, "it shall be unlawful for any board of health, board of education or any other public board to compel by resolution, order or proceedings of any kind the vaccination of any person of any age; . . . ."[2] The most emphatic prohibition against vaccination is found in a South Dakota statute which provides that, "it shall be unlawful for any board, physician, or person to compel another by the use of physical force to submit to the operation of vaccination with smallpox or other virus."[3]

Immunity from smallpox.--It is a well established fact that immunity from smallpox depends, to a large extent, upon the recency of vaccination against, or an attack of the disease. Such recency is rarely specified by statute in terms of a definite number of years,[4] and even then may be changed at the discretion of the school board.[5] Several of the states requiring vaccination as a condition precedent to school attendance, leave the matter of recency of vaccination to the local school authorities,[6] local

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State of New Hampshire, January Session, 1929, chap. 139, sec. 1. Virginia Code, 1936, sec. 690, p. 184.

[1]Supplement to 1913 Compiled Laws of N. Dakota, 1913-1925, sec. 425 (a)(1), p. 247.

[2]Revised Statutes of Utah, 1933, sec. 35-3-10, p. 500.

[3]South Dakota Code, 1939, Vol. I, sec. 27.2201.

[4]South Dakota Code, 1939, Vol. I, sec. 27.2202.

[5]Code of Iowa, 1939, chap. 329, sec. 6846.

[6]1938 Supplement to New Mexico Statutes, 1929, chap. 110, sec. 348. Oregon Code, 1930, sec. 35-1110. Throckmorton's Ohio Code, Baldwin's Revision, 1936, sec. 7686.

health authorities,[1] or the state board of health.[2] As a rule, however, statutes requiring or authorizing vaccination do not specify the number of years vaccination or the disease itself renders a child legally immune from smallpox, nor do they, as a rule, designate the authorities who have the power to specify such period of time. Such power is probably vested in the authorities upon whom the power of exclusion is conferred by statute. If this assumption is correct, the question of what authorities have the power to exclude pupils from school until evidence of immunity is established, becomes pertinent. With very few exceptions, such power is granted by statute to local district authorities. Only five of the states mentioned in Table 5 delegate such power to health authorities, either to local health boards[3] or to the state board of health.[4] And all five of these are states where the statutes provide that immunity from smallpox may be made a condition to school attendance only when an epidemic of the disease is present.

It appears, then, that whenever statutes specifically require immunity from smallpox as a condition precedent to school attendance, or whenever they authorize requiring immunity from smallpox as a condition to such attendance, even in the absence of an epidemic, the local school authorities have the power to exclude pupils who do not conform with the requirement. However, where evidence of immunity cannot be demanded as a condition to school attendance except when the disease exists in the community, the power to enforce the requirement is usually left to local or state health authorities.

Other provisions controlling vaccination.--In a few instances the statutes merely authorize some board to make all necessary rules and regulations relating to vaccination. Such authority may be granted to the local board of each school district,

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[1] Wisconsin Statutes, 1939, sec. 143.13 (1)(3).

[2] Code of Laws of South Carolina, 1932, sec. 5012. School Code of California, 1937, Div. 3, Pt. 1, chap. 5, sec. 3.60.

[3] North Carolina Code, 1935, sec. 7162. Wisconsin Statutes, 1939, sec. 143.13 (1).

[4] Revised Codes of Montana, 1935, chap. 230, sec. 28.41. Mason's Minnesota Statutes, 1927, chap. 29, sec. 5345. Code of Iowa, 1939, chap. 329, sec. 6846.

and includes the power to make and enforce such rules and regulations to secure vaccination of and to prevent the spread of smallpox among pupils as in the opinion of the school board the safety and interest of the public require.[1] Such provision delegates much discretion to local district authorities.

Another unique provision takes all authority for making rules and regulations concerning vaccination from the hands of school authorities and local health authorities. It provides that, "the control of smallpox shall be under the direction of the state board of health, and no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities."[2]

Immunization to diphtheria.--Diphtheria is the only disease, other than smallpox, to which immunity may be required as a prerequisite to school attendance. Two states have enacted such legislation. A New Jersey statute authorizes the local board of education of any school district in the state to require immunization to diphtheria and also gives such board the discretion to require or waive proof of immunity. Furthermore, these boards have power to require pupils who have had diphtheria to submit to proper tests in order to establish immunity.[3]

The only other state which deals with immunization to diphtheria is West Virginia. That state goes even further than New Jersey by making such immunication compulsory by statute. All pupils entering school for the first time in that state, who cannot furnish proof of immunization or present a certificate from a reputable physician that immunization is improper or impossible, must be immunized within the first month of attendance at school. Pupils who wish to enter school after the first month must meet the above requirements before they may be admitted.[4]

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[1] Throckmorton's Ohio Code, Baldwin's 1936 Revision, sec. 7686. Code of Georgia, 1933, sec. 32-911.

[2] School Code of California, 1937, Div. 3, Pt. 1, chap. 5, sec. 3.60.

[3] Acts of 163rd Legislature, New Jersey, 1939, chap. 299, pp. 727 f.

[4] West Virginia Code, 1937, sec. 1285 (4).

Court Decisions Relating to Health as It Affects Public School Attendance

The above analysis of the statutes has revealed that many state legislatures have either required or authorized certain designated officials to deny pupils the privilege of the schools until they have met the specific health conditions stipulated in the statutes or adopted by local school or health authorities. The authority of state legislatures to define health requirements or to empower school and health boards to promulgate regulations affecting school attendance has often been questioned. Likewise, the authority of school and health boards to make compliance with their own health rules a condition precedent to school attendance in the absence of any express statutory authority has been a subject for litigation in the courts.

General Physical Examination as a Requirement for Public School Attendance

While many of the states have enacted legislation providing for the physical examination of all pupils attending the public school, none of them has provided specifically that a pupil may be excluded from school until he produces evidence that such examination has been made. However, such exclusion has been attempted by school boards. In a case testing whether these boards may exercise such authority, a pupil was excluded because he refused to present a certificate from a physician showing that he had submitted to a physical examination and was therefore entitled to attend the public schools. After overruling all minor objections that were urged against the regulation, the court decided the case upon the point of whether or not the school board had the authority to invoke the police power. It pointed out that the legislature, in which all police power lies, may create municipal and quasi-municipal bodies to act as governmental agencies for the promotion of the general welfare, and that each such agency has certain functions to perform in the promotion of such public welfare. An excerpt from the opinion of the court follows.

> Necessarily incident to the creation and existence of one of these political entities is the power to provide those rules and regulations upon the proper enforcement of which depends its ability to perform the particular function for which it was created. While express legislation may give to such an agency certain express police powers, it should never

> be held that the naming of the powers precludes it from exercising any other powers; but it should be held that, upon the creation of a municipal body, it becomes possessed of all necessary and reasonable police power, and that express enactments relating to the police power of such body do not curtail the necessary and reasonable police power of such body, except where it is clear that it was the legislative intent to so curtail them. In the present case such power has not been so curtailed. Hence, the rule of the board is valid.[1]

Exclusion Because of Communicable Disease

There appears to be no case directly testing the authority of a state legislature to exclude, by statutory enactment, pupils from the public schools when suffering with or exposed to a communicable disease. The only litigation on the exclusion of pupils for such cause has dealt with the power of health and school boards to exclude pupils without express statutory authority. Although such power has seldom been disputed, it has been uniformly held that in the interests of the health of all the pupils such boards may exclude pupils affected with or exposed to a contagious disease.[2] In a North Dakota county the disease of trachoma became prevalent. To prevent the spread of the disease the county board of health issued an order excluding from school all children suspected of being afflicted unless they were under treatment for the disease. Under this order, two of the children excluded sought to be reinstated on the ground their affliction was not trachoma. In denying the writ of mandamus prayed for the court said:

> The order of exclusion in the instant case cannot be said to be unreasonable. It only excludes those whose cases are positive and suspected, who are not at the time under treatment. The seriousness of the disease and its communicable character afford ample foundation for such an order; and, even conceding that it may be doubted in the instant case whether the children in question are affected, the doubt is one that must be resolved in favor of the authorities charged with the serious responsibility of preventing the spread of the disease. This is a case where mandamus does not issue as a matter of right, but where it will only issue in the exercise of a judicial discretion, and this discretion should not be exercised

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[1] Streich v. Board of Education, 34 S.D. 169, 147 N.W. 779, L.R.A. 1915A 632, Ann. Cas. 1917A 760 (1914).

[2] Martin v. Craig, 42 N.D. 213, 173 N.W. 787 (1919). Stone v. Probst, 165 Minn. 361, 206 N.W. 642 (1925). Carr v. Inhabitants of Dighton, 229 Mass. 304, 118 N.E. 525 (1918).

> in a way that might result in needlessly exposing healthful children to a disease as serious as trachoma.[1]

Likewise, school boards have the power to make and enforce rules excluding pupils who are a menace to the health of the other pupils in the school.[2] The home rule charter of the city of Minneapolis created a board of education stipulating that, "it shall have the entire control and management of all the common schools within the city . . . . and make rules and regulations for the government of the schools." Vested with this general authority the school board provided rules for the government of the school among which was one providing that pupils might be excluded because of infectious diseases. A child suffering with a sore throat and troubled with hoarseness was excluded from school until such time as she furnished the school authorities with a negative report from a throat culture submitted to the division of public health of the city. Furthermore, she was to present to these same authorities "a certificate from a physician as to the condition of her throat or submit to a physical examination by the regularly employed school physicians or nurses." The refusal of the child was "based upon conscientious objections incident to being a Christian Scientist." It was contended in the case that the making of such rules by the school board was unauthorized and unconstitutional in that it violated a constitutional provision prohibiting the delegation of legislative power. In denying the contention the court said:

> It is contended here that the school board by its rules has assumed to enact a law, and that it is without legislative authority. Of course the legislative body can not be permitted to relieve itself of this power by delegating it to another body. But the constitutional inhibition can not be extended so as to prevent the grant of legislative authority to administrative boards to adopt rules to carry out a particular purpose. It can not be claimed that every grant of power to administrative boards involving the exercise of discretion in judgment must be considered as a delegation of legislative authority. There are many matters relating to methods or details which may be by the legislative body referred to a particular administrative board. Such matters fall within the domain of the right of the legislative body to authorize an administrative board to make rules or regulations in aid of the successful execution of some general statutory provision or to enable it to carry out the purpose

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[1] Martin v. Craig, 42 N.D. 213, 173 N.W. 787 (1919).

[2] Stone v. Probst, 165 Minn. 361, 206 N.W. 642 (1925).

> of its existence. These rules come within this class and are administrative provisions.[1]

It was also contended that the rules were arbitrary and unreasonable, especially in light of the fact that there was a compulsory statute making it a crime for parents not to send their children to school, and that there was a statute providing for the punishment of school officials when they wrongfully exclude children from school. On this point the court held:

> . . . . It is claimed that these statutes tend to show that the rules in reason should be more considerate and in fact should be operative only in case of an epidemic, and then only for a reasonable time. This controversy arises from a sore throat. The teacher could not be expected to determine if it was ordinary or streptococcic or the early stage of some other contagious or infectious children's disease. We must recognize that one child may quickly spread a disease among the many children it comes in contact with in school. It seems more reasonable to us to have the rules applicable in preventing as well as in controlling an epidemic. The court should not attempt to substitute its judgment as to what the rules should be, when operative, or the period of operation. In fact, these rules do not really exclude any one except by his own volition. The record in this case merely placed before plaintiff a condition to his child's admission to the school. The condition required is a certificate of a physician, and, in case of sore throat or suspected diphtheria, a negative report from a culture submitted to the division of public health. . . . . The child is required to remain away if he will not submit to the rule. The board asks only for such information as it deems necessary in the proper administration of the schools. This information would result in exclusion only in the event that the child himself was a menace to his associates. The board provides a way for the child to qualify for admission without any cost or expense. The matter is entirely in his own hands.
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> We conclude that the rules are made in good faith and are not unfair, arbitrary, or unreasonable, and hence cannot be disturbed by the courts.[2]

School Attendance as Affected by Vaccination

Just as vaccination against smallpox is dealt with more frequently in the statutes than any other disease affecting school attendance, so it has received more attention by the courts. The validity of statutes which make vaccination or other evidence of immunity from smallpox a prerequisite to school attendance, as well as the validity of those statutes which authorize school

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[1] Stone v. Probst, 165 Minn. 361, 206 N.W. 642 (1925).

[2] Stone v. Probst, 165 Minn. 361, 206 N.W. 642 (1925).

boards to require vaccination, has often been questioned. Likewise, the power of local school authorities to make such a regulation has been challenged when these authorities have indirect legal sanction for their action or when they act only under their general power to govern the school.

The validity of statutes requiring vaccination.--There is no exception to the ruling that state legislatures have the power to enact legislation expressly requiring all pupils of the state to be vaccinated or to present other evidence of immunity from smallpox as a condition precedent to public school attendance. And such legislation is valid even in the absence of an epidemic of smallpox or a reasonable apprehension of an outbreak thereof, since it is a valid exercise of the police power of the state.[1] There are several grounds, however, upon which the validity of this legislation has been attacked. The most frequent contention urged is that, it is class legislation, since it applies only to those who, in the general population, are attending school. Typical of the ruling of many of the courts is that found in a California case.

> The act applies equally to all children of school age desiring to attend the common school, and is uniform as to all of them so far as the requirement of vaccination is concerned. . . . . This effort to prevent the spread of contagion in a direction where it might do the most good for the benefit and protection of all the people, and there is no element of class legislation in it. It in no way interferes with the right of the child to attend school, provided the child complies with its provisions.[2]

Likewise, it has been held that statutes making such requirements do not constitute an unreasonable restraint upon personal liberty, inasmuch as their purpose is for the public good,[3] and neither do they interfere with religious liberty and conscientious scruples

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[1]State v. Shorrock, 55 Wash. 208, 104 Pac. 214 (1909). Bissell v. Davison, 65 Conn. 183, 32 A. 348, 29 L.R.A. 251 (1894). French v. Davidson, 77 Pac. 663, 143 Cal. 658 (1904). Viemeister v. White, 72 N.E. 97, 179 N.Y. 235, 70 L.R.A. 796 (1904). State v. Board of Education, 76 Ohio St. 297, 81 N.E. 568 (1907). People v. Ekerold, 211 N.Y. 386, 105 N.E. 670, Ann. Cas. 1915C. 552 (1914). Barber v. School Board of Rochester, 82 N.H. 426, 135 A. 159 (1926). Cram v. School Board of Manchester, 82 N.H. 495, 136 A. 263 (1927). Field v. Robinson, 198 Pa. 638, 48 Atl. 873 (1901).

[2]French v. Davidson, 77 P. 663, 143 Cal. 658 (1904).

[3]Abeel v. Clark, 84 Cal. 266, 24 P. 383 (1890). Cram v. School Board of Manchester, 82 N.H. 495, 136 A. 263 (1927).

concerning vaccination.[1] Furthermore, it can not be successfully contended that such statutes involve an assault or trespass upon the body of any child.[2]

Vaccination in the absence of express statutory authority.--Very often the question arises as to whether pupils may be excluded from school when there is no express statutory authority for such exclusion. Many state legislatures have delegated the supervision of health to health boards and boards of school directors. The authority to make rules concerning health is commonly delegated directly to the board of health which then requires or authorizes school boards to enforce its rules as they apply to school attendance. In some cases, however, there is only the general power granted to school boards to govern the school. Whether such power may be delegated and whether it is inclusive enough to empower these boards to deny pupils the privileges of school unless they prove their immunity from smallpox, are questions which courts are often called upon to decide. A factor influencing many decisions is the presence or absence of the disease in the school district or the immediate community in which the school is located.

In the absence of an epidemic.--The power of health and school boards to require vaccination as a condition precedent to school attendance when no epidemic of smallpox exists in the community has been challenged many times. Although the courts are divided on the question, the rule appears to be well established that such boards may not, in the absence of express statutory authority, refuse to admit children not vaccinated to the public school when there is no epidemic of smallpox and no outbreak of an epidemic to be reasonably apprehended.[3] This ruling is well illustrated in an Illinois case in which a statute provided that the state board of health "shall have charge of all matters per-

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[1] Commonwealth v. Green, 268 Mass. 585, 168 N.E. 101 (1929). State v. Drew, 192 A. (N.H.) 629 (1937).

[2] State v. Drew, 192 A. (N.H.) 629 (1937).

[3] Potts v. Breen, 167 Ill. 67, 47 N.E. 81, 39 L.R.A. 251 (1897). Matthews v. Board of Education, 127 Mich. 530, 86 N.W. 1036 (1901). Bright v. Beard, 132 Minn. 375, 157 N.W. 501 (1916). Osborn v. Russell, 64 Kan. 507, 68 P. 60 (1902). State v. Burdge, 95 Wis. 390, 70 N.W. 347, 37 L.R.A. 157 (1897). People v. Board of Education, 234 Ill. 422, 84 N.E. 1046 (1908).

taining to quarantine, and shall have authority to make such rules and regulations . . . . as they may from time to time deem necessary for the preservation or improvement of public health. . . . ." The statute further provided that it was the duty of all officers and employees of the state to enforce such regulations. Under this statute the state board of health adopted the rule that after a certain date "no pupil shall be admitted to any public school in the state without presenting satisfactory evidence of proper and successful vaccination." A local school board in obedience to the statutory mandate attempted to enforce the rule. The court pointed out that if the state legislature had intended to confer such power upon the state board of health it would have done so expressly and not by mere implication, and that the board could not invoke the police power except in case of necessity. Concerning these points the court held:

> . . . . it cannot be supposed that the legislature has undertaken, and not expressly, but by mere implication from the general language used in creating the state board, to confer upon that mere administrative body such vast power over the rights and liberties of the individual citizen as to deprive him of his constitutional and statutory rights, unless he shall submit his body to be innoculated with vaccine virus, as a mere precaution against some possible future contagion of smallpox.
>
> The power to compel vaccination, or to require it as a condition precedent to the exercise of some right or privilege guarantied to the citizens by public law, can be derived from no other source than the general police power of the state, and can be justified upon no other ground than as a necessary means of preserving the public health. Without the necessity, or reasonable grounds upon which to conclude that such necessity exists the power does not exist.[1]

While the above rule appears to be the one usually followed, there are a few jurisdictions which hold that health and school boards may require vaccination even when no epidemic of smallpox is present in the school community.[2] A case in point is one arising in a city in the state of Mississippi. Pursuant to a statutory delegation of authority to promulgate rules for the control

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[1] Potts v. Breen, 167 Ill. 67, 47 N.E. 81, 39 L.R.A. 152 (1897).

[2] Booth v. Board of Education of Ft. Worth Independent School District, 70 S.W. (2d)(Tex.) 350 (1934). Allen v. Ingalls, 182 Ark. 991, 33 S.W. (2d) 1099 (1930). Hartman v. May, 168 Miss. 477, 93 A.L.R. 1408 (1934). Johnson v. City of Dallas, 291 S.W. (Tex.) 972 (1927). Zucht v. King, 225 S.W. (Tex.) 267 (1920).

of health in the city, the city passed an ordinance requiring vaccination as a prerequisite to school attendance. The school board sought to enforce the ordinance. A child who refused to be vaccinated sought admission to school on the ground that the general power to make regulations to prevent the introduction and spread of contagious or infectious diseases did not impower municipal authorities to make vaccination a prerequisite to school attendance. The court pointed out that the right of the legislature to enact health regulations finds its basis in the police power of the state, and that this police power may be delegated for appropriate purposes to the various municipalities. Concerning the matter of whether the city had sufficient power under this general grant to make such specific regulations the court ruled:

> In the exercise of the power and authority granted to make regulations to secure the general health, and prevent the introduction and spread of contagious or infectious diseases, much must be left to the judgment and discretion of the municipal authorities, and the presumption is in favor of the reasonableness and propriety of regulations enacted in pursuance of such grant of power. The ordinance here in question was intended and reasonably calculated to prevent the introduction and spread of contagion, and bears a direct and intimate relation to the maintenance of the health of the inhabitants of the municipality, and we are unable to say that in the enactment thereof there was an unreasonable or arbitrary exercise of power.[1]

Likewise, it has been held that a grant of power by a city charter to a school board for the safeguarding of the health of the pupils and teachers in the schools of the city is sufficiently definite to give such board the power to make vaccination a condition precedent to school attendance in the absence of an epidemic of smallpox.[2] And there is also precedent for exclusion under such conditions by school boards deriving their authority from a city charter which grants such boards only the general power to provide and maintain an efficient system of public schools.[3]

In the presence of an epidemic of smallpox.--There is

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[1] Hartman v. May, 168 Miss. 477, 151 So. 737, 93 A.L.R. 1408 (1934).

[2] Booth v. Board of Education of Ft. Worth Independent School District, 70 S.W. (2d)(Tex.) 350 (1934).

[3] Johnson v. City of Dallas, 291 S.W. (Tex.) 972 (1927). Hutchins v. School Committee of the Town of Durham, 137 N.C. 68, 49 S.E. 46 (1904).

complete unanimity in the rulings of the courts in upholding the exclusion of unvaccinated pupils in the absence of statutory authority when there is an epidemic of smallpox actually present or an outbreak thereof may be reasonably apprehended.[1] Statutes which delegate authority to boards of health to make all needful rules and regulations for the prevention of the spread of contagious or infectious diseases and to promote the health of the citizens of the state are not invalid by reason of a constitutional provision which vests all legislative power in the state legislature.[2] For example, where pupils were denied admission to school by the board of health until they were vaccinated, the power of exclusion being derived from a general statute authorizing such board to prevent the spread of smallpox or other contagious disease, it was held that the authority to make such a rule was necessary to prevent the spread of the disease and, therefore, administrative in character. In so holding the court said:

> . . . . There must be some elasticity, in order to effectually meet varying conditions, and the Legislature has seen fit to fix the ultimate purpose of the regulation to be the "common safety," and to leave the details necessary to work out that purpose to an administrative board. We cannot say upon this record that the members of that board have chosen the wrong means, or that they lack the power in the exercise of their honest judgment to make the regulation here considered.[3]

Pupils excluded under such a rule may not successfully contend that it interferes with the rights of conscience in the matter of

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[1] Zucht v. San Antonio School Board, 170 S.W. (Tex.) 840 (1914). State v. Board of Education of Salt Lake City, 21 Utah 40, 60 P. 1013 (1900). Duffield v. School District of Williamsport, 162 Pa. St. 476, 29 Atl. 742, 25 L.R.A. 152 (1894). Blue v. Beach, 155 Ind. 121, 56 N.E. 89 (1900). McSween v. Board of Trustees, 129 S.W. (Tex.) 206 (1910). Hagler v. Larner, 284 Ill. 547, 120 N.E. 575 (1918). Board of Trustees v. McMurty, 169 Ky. 457, 184 S.W. 390 (1916). State v. Cole, 220 Mo. 697, 119 S.W. 424 (1909). Staffel v. San Antonio School Board of Education, 201 S.W. (Tex.) 413 (1918). State v. Martin, 204 S.W. (Ark.) 622 (1918). State v. Zimmerman, 86 Minn. 353, 90 N.W. 783, 58 L.R.A. 78, 91 Am. St. Rep. 351 (1902). State v. Partlow, 119 Wash. 316, 205 P. 420 (1922).

[2] Blue v. Beach, 155 Ind. 121, 56 N.E. 89 (1900). State v. Zimmerman, 86 Minn. 353, 90 N.W. 783 (1902). People v. Board of Education of City of Lansing, 224 Mich. 388, 195 N.W. 95 (1923).

[3] People v. Board of Education of City of Lansing, 224 Mich. 388, 195 N.W. 95 (1923).

religion.[1] For it has been held that it is not the rule that prevents the pupils from attending school, but their own conscience, beliefs, and convictions.[2] Neither will the courts sustain the contention that a rule denying unvaccinated pupils admission to school during an epidemic of smallpox is violative of the due process clause of the federal constitution.[3]

The further question arises, when there is no express statutory authority to require vaccination in the presence of an epidemic of smallpox, as to who has the authority to make a rule excluding pupils from school. As a rule, school boards merely enforce the regulations adopted by boards of health which derive their authority directly from statutes creating such boards,[4] or from city charters.[5] The authority granted in this manner is very general, merely empowering such boards to adopt such rules and regulations for the promotion of health and the control of disease as they may from time to time deem necessary. Under the same general type of authority derived directly from statutes, school boards, it has been held, may require vaccination when there is an epidemic of smallpox in the community.[6] Likewise, the authority to exclude pupils in such situations may be derived directly from city ordinances.[7] For example, where a statute pro-

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[1] City of New Braunfels v. Walderschmidt, 109 Tex. 302, 207 S.W. 303 (1918). Staffel v. San Antonio School Board, 201 S.W. (Tex.) 413 (1918).

[2] Staffel v. San Antonio School Board, 201 S.W. (Tex.) 413 (1918).

[3] City of New Braunfels v. Walderschmidt, 109 Tex. 302, 207 S.W. 303 (1918).

[4] Blue v. Beach, 155 Ind. 121, 56 N.E. 89 (1900). Zucht v. San Antonio Board of Education, 170 S.W. (Tex.) 840 (1914). State v. Beil, 157 Ind. 25, 60 N.E. 672 (1901). State v. Martin, 204 S.W. (Ark.) 622 (1918). State v. Zimmerman, 86 Minn. 353, 90 N.W. 783, 58 L.R.A. 78 (1902). State v. Partlow, 119 Wash. 316, 205 P. 420 (1922).

[5] State v. Board of Education of Salt Lake City, 21 Utah 401, 60 P. 1013 (1900).

[6] Staffel v. San Antonio School Board of Education, 201 S.W. (Tex.) 413 (1918). Zucht v. San Antonio School Board, 170 S.W. (Tex.) 840 (1914).

[7] City of New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S.W. 303 (1918). Vonnegut v. Baun, 206 Ind. 172, 188 N.E. 677

vided that a city council should have the authority "to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease," the supreme court of Texas held that the city council was sufficiently authorized to enact an ordinance excluding pupils from school until they were vaccinated when there was an epidemic of smallpox prevalent in the school district. The court took the position that the ordinance was "no more than a mere regulation deemed necessary and expedient by said city council, to suppress the disease of smallpox."[1]

There are a few instances in which there has been a disagreement between school boards and boards of health as to which has the power to require vaccination as a prerequisite to school attendance. In Lansing, Michigan, for example, the board of health and the board of education worked together for a time in controlling the spread of an epidemic of smallpox in that city. When only seventeen active cases of the disease remained, the board of education issued an order permitting all unvaccinated children to return to school. The board of health contended it had the power to enforce the vaccination rule by virtue of a statute which provided, among other things, that "when the smallpox, or any other disease dangerous to the public health, is found to exist in any township, the board of health shall use all possible care to prevent the spreading of the infection . . . . by such means as in their judgment shall be most effectual for the common safety." Mandamus proceedings were instituted in the name of the people of the city of Lansing to compel the board of education to enforce the rule of the board of health. In holding that the health board had not exceeded its statutory authority, the court concluded:

> When we consider that one child may innocently communicate the disease to all its playmates in school, and realize how quickly the scourge spreads, unless restrained, it becomes evident that courts ought not to stay the hands of an administrative board seeking to protect the public health, unless clearly convinced that the board is acting arbitrarily and in abuse of discretion. Courts ought not to under such circumstances with pencil and paper figure out percentages

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(1934). Hagler v. Larner, 284 Ill. 547, 120 N.E. 575 (1918).

[1]City of New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S.W. 303 (1918).

> and probabilities, and say to such board we will substitute our judgment for yours, and unless a certain percentage of the population is stricken, you may not act.[1]

Similarly, where a county board of health ordered the county health officer to enforce a rule, adopted by the state board of health under a statutory grant of power to prevent the spread of contagious diseases, requiring vaccination as a condition precedent to school attendance, the court held that the school board could not enjoin the enforcement of such rule.[2] However, when boards of health have complete authority to adopt rules excluding unvaccinated pupils from school but for any reason refuse to act, school boards have the authority to make and enforce such rules whenever, in their judgment, the necessity therefor exists. Such authority is implied from the act creating the school board which must possess the police power necessary to carry out the purposes for which it was created.[3]

While it is evident that the courts will allow considerable flexibility in the administration of vaccination statutes, they will uphold no rules of exclusion unless there is some statutory authority expressed or implied upon which such rule is based. An order issued by an attendance officer requiring all pupils between eight and fourteen years of age to be vaccinated before being admitted to school is void on the grounds that there was no authority to make any such rule [4] For the same reason a city superintendent of schools acting under the advice of a state health commissioner may not exclude pupils from school for a specified number of days unless they are vaccinated. This was attempted by the superintendent of schools of the city of Chicago. Since the defendants cited no statute or board rule as furnishing authority for the action, the court declared the order of the superintendent void.

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[1] People v. Board of Education of City of Lansing, 224 Mich. 388, 195 N.W. 95 (1923).

[2] Boards of Trustees v. McMurty, 169 Ky. 457, 184 S.W. 390 (1916).

[3] McSween v. Board of School Trustees, 60 Tex. Civ. App. 270, 129 S.W. 206 (1910).

[4] Sherman v. Board of Education, 165 Ga. 889, 142 S.E. 152 (1928).

> The exclusion of the plaintiff in error must therefore be regarded as the sole act of the superintendent, which finds no authority in any rule or regulation affecting his action. It was an arbitrary act because resting upon no rule of law but depending only on the discretion of the superintendent to whom the law has granted no discretion.[1]

Exemption from the requirement of vaccination.--Most of the statutes which require evidence of vaccination as a prerequisite to school attendance, contain a provision exempting from the requirement all pupils presenting a certificate from a licensed physician or the board of health that they are not fit subjects for vaccination. The question arises as to how often any pupil may be required to renew such certificate. In a school district in Massachusetts, the school committee adopted a rule requiring that every pupil who had been given a certificate by a physician stating that such pupil was not a fit subject for vaccination, "shall be required to renew such certificate once in two months." This rule was made in pursuance of a statute which provided for the exemption from vaccination "while such conditions continue." Children excluded under the rule sought a writ of mandamus to compel the school committee to readmit them to school. In refusing to issue the writ the court pointed out that, by statute, the school committee had authority to make reasonable rules governing the school, including the qualification of pupils to be admitted, and that therefore the right of attendance may in some instances be made conditional by them.[2] This ruling was cited by the same court in a more recent case arising under like conditions.[3] Similarly, in New Hampshire, a pupil excluded from school because he refused to renew his certificate each year, could not compel, by mandamus, the school committee to readmit him on the grounds that one certificate covered all time. The court sustained the rule.

> The plaintiff rests his case upon the proposition that, in all cases, one certificate is sufficient for all time. This construction cannot be adopted. The meaning of the statute is that a new certificate may be required whenever there is reasonable ground to believe that there may have been such a change of conditions that the child is not longer

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[1] Burroughs v. Mortensen, 312 Ill. 163, 143 N.E. 457 (1924).

[2] Spafford v. Carlton, 238 Mass. 528, 131 N.E. 314 (1921).

[3] Commonwealth v. Childs, 12 N.E. (2d)(Mass.) 814 (1938).

"an unfit subject for vaccination."[1]

Evidence of immunity from smallpox.--Many statutes and regulations deny children the right to attend school until vaccinated. In the enforcement of these it devolves upon some authority to determine what constitutes proper vaccination. When pupils submit certificates of vaccination, do school boards have the authority to refuse to accept them on the grounds that they reveal that some other method than the one prescribed by the board has been employed? The courts have held that school and health boards may prescribe the method to be used, and that pupils may not be admitted to school until they present a certificate which bears evidence that the method of vaccination prescribed has been used.[2] In all the cases which have been before the courts, it has been held that boards of education may demand that vaccination be effected through the injection, by scarification, of the bovine vaccine virus through the skin.[3] For example, a rule by a school board in a school district in Arkansas required that pupils must present satisfactory evidence of having been successfully vaccinated. The board of health prescribed the method of vaccination as the usual one of the introduction into the body of the virus of cowpox, by scarification, through the skin. The authority to make such prescription on the part of the board of health was a statute which gave it the general power to adopt and promulgate rules and regulations for the control and prevention of infectious, contagious, and communicable diseases. All but a few of the pupils complied with the board rule. These few presented certificates of vaccination from a homeopathic physician, which meant that they had been vaccinated by taking medicine in powder form through the mouth. The school board contended these certificates did not carry evidence of the proper method of vaccination prescribed by the board of health and refused the pupils so vacci-

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[1] Barber v. School Board of Rochester, 82 N.H. 426, 135 A. 159 (1926).

[2] Allen v. Ingalls, 182 Ark. 991, 33 S.W. (2d) 1099 (1930). State v. Cole, 220 Mo. 697, 119 S.W. 424, 22 L.R.A. (N.S.) 986 (1909). Lee v. Marsh, 230 Pa. St. 351, 79 Atl. 564 (1911). Abney v. Fox, 250 S.W. (Tex.) 210 (1923).

[3] Allen v. Ingalls, 182 Ark. 991, 33 S.W. (2d) 1099 (1930). Abney v. Fox, 250 S.W. (Tex.) 210 (1923). Lee v. Marsh, 230 Pa. St. 351, 79 Atl. 564 (1911).

nated admission to the school. It was contended that the board of health had no power to define the method of vaccination and that the certificates of vaccination presented were conclusive in so far as the school board was concerned. The following excerpt from the opinion of the court is a direct answer to such contention.

> The majority is of the opinion . . . . that the power to prescribe the method for vaccination against smallpox was necessarily impliedly granted, and that the statute granting powers and prescribing the duties of the state board of health and that the regulations made by it prescribing the method for vaccination was not arbitrary, but only a reasonable exercise of such power. That the method for vaccination prescribed by the board was but an expression of the meaning of the term in accordance with the common knowledge of mankind, and as understood by the concensus of opinion of the medical profession and practiced by a great majority thereof; the term, itself, meaning the method as defined by the board as effectually as though it had been so defined in the statute.[1]

Thus, it appears to be clearly established that school and health authorities may deny pupils the right to attend school until they present evidence of successful vaccination by a method which these authorities have prescribed.

Vaccination and compulsory school attendance.--Where a pupil is excluded from school because of failure to be vaccinated, the question arises as to whether his parents may be prosecuted under the compulsory-attendance statute. There are some jurisdictions which hold that a parent may not avoid the penalty of the compulsory-attendance statute by persistently refusing to have his child vaccinated.[2] The position taken by the courts in these jurisdictions is best expressed by the opinion of the New York court. A parent attempted to send his unvaccinated child to school and claimed this action as a defense against prosecution under the compulsory-attendance statute. The statute requiring vaccination was enacted one year before the one making school attendance compulsory. The court held that the parent had no defense against prosecution under the compulsory-attendance statute.

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[1] Allen v. Ingalls, 182 Ark. 991, 33 S.W. (2d) 1099 (1930).

[2] People v. Ekerold, 211 N.Y. 386, 105 N.E. 670, L.R.A. 1915 D 223 (1914). State v. Drew, 192 A. (N.H.) 629 (1937). Commonwealth v. Green, 268 Mass. 585, 168 N.E. 101 (1929). State v. Shorrock, 55 Wash. 208, 104 P. 214 (1909).

> If indifferent or selfish parents for ulterior purposes, such as the desire to place young children at labor instead of school, or from capricious or recalcitrant motives, may be allowed to manufacture easy excuses for not sending their children to school, a ready method will have been developed for evading the statute compelling such attendance, and if the statute which requires parents to see to it that their children attend and take advantage of this school system may be lightly and easily evaded, the purposes of the state in providing and insisting on education will be frustrated and impaired. Failure to comply with the statute ought not to be excused except for some good reason.[1]

Similarly, in a New Hampshire case, a child was denied admission to school because he refused to be vaccinated. The school board brought suit to compel the father, under the compulsory-attendance statute, to send his child to school. The father objected partly on religious grounds. The court held that it was irrational for the defendant to contend that he did his full duty as citizen and father when he demanded that his son be admitted to the school without vaccination, and that since he refused to send his child to school vaccinated, he must pay the penalty for not submitting to a valid law.[2]

On the other hand there are jurisdictions which take an opposite view and hold that parents may evade the compulsory-attendance statutes by refusing to permit their children to be vaccinated. That is, parents may discharge the duty expressly enjoined by the attendance statute when they cause their children to offer themselves for admission to the school.[3]

An opinion in a Pennsylvania case is a good example of this position. In that state there was a compulsory vaccination law and a compulsory attendance law. Legal action was taken against a parent who refused to have his child vaccinated. The parent claimed a defense by having attempted to send his child, not vaccinated, to school. The court held that the parent discharged all the duties expressly enjoined by the statute by sending his son to school, even though another statute required the school to refuse him admission. The court then said:

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[1] People v. Ekerold, 211 N.Y. 386, 105 N.E. 670 (1914).

[2] State v. Drew, 192 A. (N.H.) 629 (1937).

[3] State v. Cole, 220 Mo. 697, 119 S.W. 424, 22 L.R.A. (N.S.) 986 (1909). State v. Turney, 31 Ohio Cir. Ct. Rep. 222 (1909). Commonwealth v. Smith, 9 Pa. Dist. Rep. 625 (1900).

> This is a penal statute and must be construed strictly and according to its letter. The meaning of this rule of construction is that penal statutes, such as the one under consideration, are not to be regarded as including anything which is not within their letter as well as their spirit. . . .
>
> We must conclude from the foregoing that the compulsory-education Act, by its terms, did not make it obligatory upon the defendant to obtain a certificate. His sole duty prescribed by it was to send his child to school. He did this. . . . . The defendant made a complete answer to the case of the Commonwealth when he showed that he had sent his son to school until he was denied admission by the teacher.[1]

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[1] Commonwealth v. Smith, 9 Pa. Dist. Rep. 625 (1900).

CHAPTER IV

MENTAL ABILITY OF PUPILS AS AFFECTING THEIR ATTENDANCE UPON PUBLIC SCHOOLS

It has long been recognized that a pupil's progress in school depends, to a large extent, upon his mental capacity. With the development and improvement of mental tests, much interest has been manifested in the mental status of children attending public schools. Consequently, many investigations and studies have produced a large body of data showing wide differences in the mental abilities of pupils attending the same instructional program. That some of these pupils are so low in mental ability that they cannot profit from the regular class instruction, is now an established fact. Such pupils may, and often do, retard the progress made by the class as a whole. Under such circumstances, should any particular school district be legally obligated to permit such pupils to remain in the regular classes of its schools?

Statutory Provisions

Comparatively few states have enacted legislation definitely excluding pupils from school because of mental disability. No doubt a retarding influence in the passage of such legislation is the difficulty in determining when a pupil is sufficiently low in mental ability to be excluded. Some of the states which have, by statutory enactment, authorized school boards to exclude mentally retarded pupils have not defined the method by which such status of a pupil shall be determined.[1] In these states, the only stipulation in the statute merely designates the local school boards as the authorities having the power of exclusion. Thus, the California statute provides that, "the governing board of the

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[1] Code of Iowa, 1939, sec. 4270. School Code of California, 1937, Part I, chap. 1, art. 2, sec. 1.12, p. 4. Wyoming Revised Statutes, 1931, sec. 99-325, p. 1693.

school may, itself, exclude from attendance on any regular school classes any child whose physical or mental disability is such as to cause such attendance to be inimical to the welfare of other pupils."[1]

The remaining states which authorize the exclusion of such pupils have described in their statutes the method by which the mental ability of a pupil is to be determined.[2] Such determination in Indiana is made by the school superintendent, or some one designated by him, of any or all children between the ages of seven and sixteen in any attendance district; but no child may be excluded without the approval of a physician.[3] An actual examination made by a person qualified by appropriate training and experience in accordance with the regulations of the state education department is required in the state of New York. The state education department designates the persons to make the tests at the request of local school authorities, except in cities of more than one million population where the superintendent of schools designates such persons.[4] In South Dakota, the division of child welfare, working through its county welfare board and such other assistance as deemed necessary, may make a careful examination of any child who is three years or more retarded in school. No child found to be feeble-minded shall be permitted to attend the public school with normal children except where special classes are maintained. South Dakota is the only one of the states excluding children because of mental disability which defines feeble-mindedness. Individuals are "feeble-minded," who by reason of mental deficiency are incapable of doing the work of the grades in the public schools in a reasonable ratio to their years of life; or who by reason of mental deficiency and other associated defects

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[1] School Code of California, 1937, Part I, chap. 1, art. 2, sec. 1.12, p. 4.

[2] Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-505, p. 540. Baldwin's New York Consolidated Laws, 1938, sec. 624, p. 83. South Dakota Code, 1939, Vol. III, secs. 43.0504, 43.0505. Laws of G.A. of Commonwealth of Pennsylvania, 1939, act 352, sec. 1, pp. 786 f. Throckmorton's Ohio Code Annotated, Baldwin's 1940 Revision, sec. 7762-7.

[3] Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-505, p. 540.

[4] Baldwin's New York Consolidated Laws, 1938, sec. 624, p. 83.

are incapable of making the proper adjustments to life for one of their chronological age."[1]

Any child in any school district in Pennsylvania who is reported by an approved mental clinic, or by a person who is certified as a public school psychologist or psychological examiner, as being uneducable in the public schools, may be reported by the board of school directors to the department of public welfare. When the board of directors have reported such child, it is relieved of the obligation of providing education for such child.[2] In Ohio, the state department of education is authorized to prescribe standards and examinations and to approve the agencies or individuals applying such examinations in the determination of whether any particular child has the mental capacity to profit substantially from further instruction. The results of the examination must be reported to the state department of education which is the final authority in making the determination. A child determined to be incapable of profiting substantially from further instruction, as thus determined, shall not thereafter be admitted to the public schools of the state while such determination is in force.[3]

Court Decisions

The validity of statutes expressly authorizing school authorities to exclude pupils from school because of low mentality has not been tested in the courts. The question has arisen, however, whether school boards, under their general statutory power to control the schools, may exclude pupils, because of their mental disability, from the public schools. It has been held that local school boards are authorized under such general statutes to exclude pupils when they deem it for the best interests of other pupils.[4] For example, a pupil was excluded from school "because

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[1] South Dakota Code, 1931, Vol. I, sec. 30.0402, p. 1214.

[2] Laws of General Assembly of Commonwealth of Pennsylvania, 1939, act 352, sec. 1, pp. 786 f.

[3] Throckmorton's Ohio Code Annotated, Baldwin's 1940 Revision, sec. 7762-7.

[4] Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (1893). See also State v. Board of Education, 169 Wis. 231, 172 N.W. 153 (1919).

he was too weak-minded to derive profit from instruction." The facts were established that he was so weak of mind as not to derive any marked benefit from instruction, and, further, that he was "troublesome to other children, making unusual noises, pinching others, etc." He was also "unable to take ordinary, decent, physical care of himself." A statute provided that the school committee shall "have general charge and superintendence of all public schools in the town." In holding that the committee, under such authority, could make the final decision on matters of fact directly affecting the good order and discipline of the school and that such facts were not reviewable by a jury, the court said:

> Whether certain acts of disorder so seriously interfere with the school that one who persists in them, either voluntarily or by reason of imbecility, should not be permitted to continue in the school, is a question which the statute makes it their duty to answer: and if they answer honestly, in an effort to do their duty, a jury composed of men of no special fitness to decide educational questions should not be permitted to say that their answer is wrong.[1]

In a more recent case decided by the Court of Appeals in Ohio, it was held that school boards do not have the final authority in excluding a subnormal pupil from school when the statute provides that,

> . . . . no child shall be determined to be incapable of profiting substantially by further instruction if the department of education shall find that it is feasible to provide for him . . . . special classes or schools, departments of special instruction or individual instruction through or by which he might profit substantially, according to his mental capacity. . . . .

The board of education in Cleveland Heights adopted a rule to the effect that pupils with intelligence quotients below fifty be excluded from school. After administering several mental tests with the approval of the state department in accordance with the statutory requirement, the board excluded an eight-year-old child who, it was claimed, had an intelligence quotient of forty-seven. The department of education withdrew from the case and did not participate in the decision to exclude the child. The court held that since the final determination was to be made by the depart-

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[1] Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (1893).

ment of education, the child had been illegally excluded.[1] However, neither the validity of the statute nor the power of the school board to fix an arbitrary standard below which pupils may be excluded from school was tested. The case was decided solely upon the point as to where the power to exclude a child of low mentality was vested. Since that point was answered by the statute, no further reasoning of the court was necessary.

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[1] Board of Education of Cleveland Heights v. State ex rel. Goldman, 47 Ohio App. 417, 191 N.E. 914 (1934). See also Hines v. Board of Education of City of New York, 10 N.Y.S. (2d) 840, 170 Misc. 745 (1939).

CHAPTER V

SCHOLARSHIP REQUIREMENTS AS AFFECTING PUBLIC SCHOOL ATTENDANCE

The quality of scholarship of the pupils in any school has long been the serious concern of teachers, supervisors, and administrators. Much of this concern arises from the fact that scholarship is the most important factor in determining the rate of progress through any school system. Likewise, it is the most important factor in determining the basis of promotion from one school unit to the next higher, especially when the next higher unit is a part of a different school system in another school district. Furthermore, once a pupil has been admitted to the lowest grade level of any school unit, his scholarship becomes an important factor in determining whether he may continue membership in such school.

Scholarship Requirements as Defined by Statutory Enactment

Many states have enacted legislation relating to the scholarship of pupils as it affects public school attendance. Such legislation seldom prescribes the rules and regulations governing the promotion of pupils through the several grades and classes in all schools of the state. In fact, only two states have such a statutory provision.[1] With these exceptions, the statutes expressly prescribing the rules and regulations governing the scholarship of pupils relate only to scholarship for admission to public high schools. As a rule, such statutes do not prescribe specific scholarship standards for admission; they merely require that a pupil seeking admission to high school must present evidence of having completed the regular course of study

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[1] General Laws of State of Idaho, 1933, chap. 93, sec. 1, p. 148. Permanent Cumulative Supplement to Compiled General Laws of Florida, 1940 Part, Vol. I, sec. 892 (195), p. 198.

prescribed for the elementary school. This evidence is usually in the form of a certificate or diploma issued by local, county or state educational authorities. Moreover, many of these statutory provisions relate only to the scholarship requirements for those pupils entering a high school which is not a part of the same system as the elementary school attended by them.

Bases for Determining Scholarship

The scholarship qualifications necessary for admission to high school are determined, in general, either by the regular promotion from the highest grade of the elementary school or by the passing of a special examination provided by certain designated authorities. Both plans are used in some states, depending largely upon whether the elementary school the pupil has attended is a part of the same system as the high school which he seeks to enter. The Iowa statute illustrates such an arrangement. After stipulating the subjects in which the county superintendent must determine the proficiency of pupils, the statute provides that no such determination need be made for admission to the high school if such pupils have completed the elementary course in the same school corporation.[1]

Completion of an elementary-school course.--The scholarship status of pupils applying for admission to high school is often determined on the basis of whether or not they have completed the prescribed course of study in the elementary school and have been graduated by the regular system of promotion from the highest grade of such school.[2] A Tennessee statute best illustrates this type of provision. It provides that, "pupils completing the eight grades in approved elementary schools shall be given a certificate of promotion to the first year of the high school. . . . ."[3] In some states, while the certificate of pro-

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[1] Code of Iowa, 1939, sec. 4276, p. 710.

[2] Annotated Code of Tennessee, 1934, chap. 2382, p. 571. South Dakota Code, 1939, Vol. I, sec. 15.2711. Wisconsin Statutes, 1939, sec. 40.47, pp. 520 f. Revised Statutes of Maine, 1930, sec. 103, p. 377. Carroll's Kentucky Statutes Annotated, 1936 Revision, sec. 4363-5. Colorado Statutes Annotated, 1935, chap. 146, sec. 179. School Code of State of California, 1937, Div. 3, Pt. 3, chap. 4, art. 2, sec. 3.300, p. 199.

[3] Annotated Code of Tennessee, 1934, chap. 2382, p. 571.

motion is all that is required, local[1] school authorities or state[2] school authorities are expressly vested with the discretion of prescribing the regulations governing the issuance of such certificates.

Passing of an examination.--The most frequent basis for determining the scholarship qualifications for entering high school is the giving of an examination covering the course of study prescribed for the elementary school.[3] The usual provision is that certain designated authorities prescribe and administer the examination and issue a certificate which admits those passing the examination to the first year of high school. In some states this arrangement applies only when the elementary work is completed in school districts not maintaining a high school,[4] and in still others it is optional in any school district in which standard supervision is maintained in accordance with rules and regulations of the state board of education.[5]

Statutes providing for examinations as a basis for promotion to high school differ also in the discretion allowed the authorities responsible for their administration. Thus, in Iowa the specific subjects in which the pupils must be examined by the county superintendent are stipulated in the statute,[6] and in Nebraska the statute stipulates the grade average and the minimum subject grade necessary for passing the examination.[7] On the

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[1] Acts and Resolves of G.A. of Vermont, 1935, sec. 8, pp. 110 f.

[2] Revised Code of Arizona, 1928, sec. 1075.

[3] Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-706, p. 568. Wyoming Revised Statutes, 1931, sec. 99-529. Oregon Code, 1930, Vol. II, sec. 35-3604. Revised Statutes of Missouri, 1929, Vol. II, sec. 9302, p. 2571. General Laws of the State of Idaho, 1933, chap. 93, sec. 1, p. 148. Nevada Compiled Laws, 1929, sec. 5826, p. 1655. Remington's Revised Statutes of Washington, 1931, sec. 5089, p. 469. General Statutes of Kansas, 1936, chap. 72, art. 51, sec. 5101.

[4] Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-706, p. 568. Code of Iowa, 1939, sec. 4276.

[5] Remington's Revised Statutes of Washington, 1931, sec. 5089, p. 469.

[6] Code of Iowa, 1939, sec. 4276.

[7] Compiled Statutes of Nebraska, 1929, sec. 79-810, p. 1580.

other hand, such matters are more often left entirely to the discretion of certain administrative boards and officials.[1] The months in the year when such examinations are to be given are prescribed by statute in some states,[2] while in others[3] the superintendent of public instruction may hold them at such times as he deems advisable.

Authorities Determining Scholarship

State authorities may certify scholarship.--State school authorities are very often given the power by statute to determine the scholarship status necessary for pupils to be admitted to high school. This power may be exercised indirectly by the state board of education when it prescribes the course of study for the elementary school,[4] or it may be exercised directly by the state superintendent of education when it is his duty to prescribe or prepare examinations determining the scholastic preparation of pupils seeking admission to high school.[5]

Status of scholarship determined by county school authorities.--Not infrequently, the authorities having the power to determine the scholastic standing of pupils are the county school officials. Such power may be broad enough to include authority for prescribing the conditions on which pupils in the elementary

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[1] General Laws of Idaho, 1933, chap. 93, sec. 1, p. 148. Nevada Compiled Laws, 1929, sec. 5826, p. 1655. Purdon's Pennsylvania Statutes, 1936, Tit. 24, sec. 1582, p. 1094. Illinois Revised Statutes, 1939, chap. 122, sec. 104, p. 2882. Compiled Statutes of Nebraska, 1929, sec. 79-901.

[2] Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-706, p. 568. General Statutes of Kansas, 1935, sec. 72-5103.

[3] Remington's Revised Statutes of Washington, 1931, sec. 5089, p. 469. Supplement of 1935 to Oregon Code, 1930, sec. 35-2801, p. 820.

[4] General Statutes of Kansas, 1935, sec. 72-5101, p. 1820. General Laws of Idaho, 1933, chap. 93, sec. 1, p. 148. Revised Code of Arizona, 1928, sec. 1075. Laws of Twenty-Third Session of Legislative Assembly of North Dakota, chap. 231, pp. 354 f. Wisconsin Statutes, 1939, sec. 40.47, pp. 520 f.

[5] Nevada Compiled Laws, 1929, sec. 5826, p. 1655. Remington's Revised Statutes of Washington, 1931, sec. 5089, p. 469. Compiled Statutes of Nebraska, 1929, sec. 79-901. Purdon's Pennsylvania Statutes, 1936, Tit. 24, sec. 1582, p. 1094.

schools may be admitted to the junior and senior high schools,[1] or to authorize the issuance of the elementary course of study, the completion of which is necessary for admission to high school.[2] As a rule, however, the power of county school authorities extends no further than to provide the examinations or to issue certificates and diplomas, as required by statute, on which admission to high school is based.[3]

Status of scholarship determined by local district authorities.--It is well known that many local district authorities determine the basis of promotion within their own schools. Such authority is seldom granted by express statutory enactment. The statutes in a few states do, however, make such grant.[4] The Vermont statute, for example, after providing that the board of education shall prescribe the regulations under which the superintendent may issue certificates of graduation from the elementary course, provides further that, "a pupil who receives such certificate at the completion of the elementary school course shall, upon presenting the same, be permitted to enter and become enrolled as a student in the first year of a high school or academy as provided by law."[5]

Pupils seeking admission to high school, but having no certificate or diploma as evidence of having the scholarship qualifications necessary for entrance to high school, may be admitted upon meeting any requirement for entrance prescribed by the au-

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[1] Alabama School Code, 1927, Art. VI, sec. 128, pp. 55 f.

[2] South Dakota Code, 1939, Vol. I, sec. 15.2711.

[3] Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-706, p. 568. Code of Iowa, 1939, sec. 4276. Illinois Revised Statutes, 1939, chap. 122, sec. 104, p. 2882. Colorado Statutes Annotated, 1935, chap. 146, sec. 179, p. 1017. Laws of Twenty-Third General Assembly of North Dakota, 1933, chap. 231, pp. 354 f. Annotated Code of Tennessee, 1934, chap. 2382, p. 571. Wisconsin Statutes, 1939, sec. 40.47, pp. 520 f. Permanent Cumulative Supplement to Compiled General Laws of Florida, 1940 Part, Vol. I, sec. 892(96)(8)(b), p. 141.

[4] Wyoming Revised Statutes, 1931, sec. 99-529. Acts and Resolves of General Assembly of Vermont, 1935, sec. 8, pp. 110 f. Carroll's Kentucky Statutes, Baldwin's 1936 Revision, sec. 4363-5. Illinois Revised Statutes, 1939, chap. 122, sec. 104, p. 2882.

[5] Acts and Resolves of G.A. of Vermont, 1935, sec. 8, pp. 110 f.

thorities of the school attended. This requirement is usually the passing of an examination given by the authorities of the school such pupils wish to attend,[1] but it may be the furnishing of any other type of evidence of their fitness for high school work.[2]

Scholarship Requirements for Admission to Junior College

In general, the scholarship requirements for admission to junior college are not expressly prescribed by statute. There is considerable difference in the requirements which are prescribed. Thus, in Mississippi a statute provides that, "every student registering in a junior college shall have completed at least fifteen units of high school work as defined by the state accrediting commission,"[3] while in Utah the whole matter of entrance requirements is left entirely to the state board of education.[4]

There is also provision, in some of the states, for the admission of persons who are not regular high school graduates. The Montana statute provides for the admission of "special students who wish to pursue special courses of college rank and who are deemed by the local authority fully qualified to do so."[5] In California, persons not regularly graduated from high school and who are over eighteen years of age may be admitted by the principal if in his judgment such persons are capable of profiting from the instruction offered in the junior college; and persons not regularly promoted from the tenth grade, but who are over sixteen years of age, may be admitted on the same basis to four-year junior colleges.[6]

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[1] Illinois Revised Statutes, 1939, chap. 122, sec. 104, p. 2882. Public Laws of Vermont, 1933, sec. 4283, p. 715. Revised Statutes of Missouri, 1929, Vol. II, chap. 57, sec. 9302.

[2] School Code of California, 1937, Div. 3, Pt. 3, chap. 4, art. 2, sec. 3.300, p. 119.

[3] Mississippi Code of Public Laws, 1930, chap. 163, sec. 6695, p. 2717.

[4] Revised Statutes of Utah, 1933, sec. 75-6-3, p. 776.

[5] Revised Codes of Montana, 1935, 1939 Pocket Part, Vol. I, chap. 120B, sec. 1322.14, pp. 158 f.

[6] School Code of California, 1937, Div. 3, Pt. 3, chap. 5, art. 3, secs. 3.370, 3.371, pp. 204 f.

Court Decisions Relating to Scholarship and Promotion of Pupils

There are three phases of scholarship which affect public school attendance. The admission of pupils to the lowest grade of any particular unit in a school system is one of these. The question involved in this connection is whether school authorities may adopt rules fixing the scholarship standards which applicants must meet for admission to the lowest grade of any school unit. Another phase is concerned with the power of school authorities to establish and enforce rules governing the promotion of pupils from grade to grade within the same unit of any school. And still another phase of scholarship, as it affects school attendance, is the authority of local school boards to demote pupils who fail to attain a standard of scholarship fixed by such boards.

Scholarship standards for admission.--School authorities, unless restricted by statutory provisions, have the power to prescribe the criteria to be used in determining whether the scholarship attainments of pupils sufficiently fit them for admission to the lowest grade of any school unit.[1] Under this general power the authorities may determine by examination the scholarship qualifications of a pupil seeking admission to a school, or they may accept in lieu of an examination a certificate of promotion granted by the school unit he has attended. Difficulty sometimes arises when the authorities in a school apply one criterion for one class of applicants and the other criterion for another class.

Such a situation arose in Parsons, Kansas, where the board of education, under the statutory power granted it to make rules for the government of the school, required graduates of a parochial elementary school to pass an examination for admission to the public high school, while at the same time they permitted the graduates of the public elementary school to enter the high school upon certificates of promotion issued by local public school authorities. The court pointed out that the public schools were compelled by state authority to meet certain standards, and that

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[1] Creyhon v. Board of Education of City of Parsons, 99 Kan. 808, 163 Pac. 145 (1917). Jones v. McProud, 62 Kan. 870, 64 Pac. 602 (1901). See also Duncan v. Board of Education of City of Sioux Falls, 47 S.D. 154, 196 N.W. 547 (1924).

the board of education could know these standards and could presume the graduates of such schools to be properly qualified to pursue the work in the public high school. In the absence of any uniform standards imposed upon parochial schools by state authorities, the board of education of the public high school could not be presumed to know whether graduates of the parochial elementary school had attained the necessary scholarship qualifications to enable them to pursue the high school course of study. In so holding the court said in part:

> . . . . The course of study, the general methods pursued, the establishment of standards, are subject to regulation. How far in a particular instance they are conformed to may always be determined by investigation conducted as a matter of right. However efficient a private school may actually be, the board does not have, and cannot have, the same facilities for satisfying itself on this point. Any opportunity afforded it for investigating the question would depend upon courtesy and not upon law; would be a privilege and not a right. And while it might well avail itself of such an opportunity and treat the diploma of such a school as a substitute for an examination if in its judgment the information acquired justified that course, a court cannot control its action in that regard.[1]

Scholarship standards for promotion.--Boards of education may adopt rules and regulations based on scholarship for the promotion of pupils from one grade to another in the same school system.[2] An Ohio case illustrates this ruling. An eight-year-old child was promoted from the fifth to the sixth grade under the rules prescribed by the board of education. During the summer vacation he was tutored in the sixth grade work, and at the opening of school in the fall he went to the seventh grade room instead of the sixth to which he had been promoted. The superintendent of the school discovered him in the seventh grade room at the end of the first week and asked him to go to the sixth grade room. The boy went home instead. The father sought a writ of mandamus compelling the school board to admit the boy to the seventh grade. The circuit court granted the writ on the ground that the evidence showed the boy capable of doing seventh grade work. On appeal, the supreme court set aside that decision, and

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[1] Creyhon v. Board of Education of City of Parsons, 99 Kan. 808, 163 Pac. 145 (1917).

[2] Board of Education v. Wickham, 80 Ohio St. 137, 88 N.E. 412 (1909).

decided the case on the question of who had the power to promote pupils from one grade to another.

> . . . . By the testimony of the realtor and his son it was made clear that the pupil was sent to the room of the seventh grade by his father and without permission of the school authorities. In other words, it was shown that he was an intruder. The willingness, if it existed at any time, of the superintendent that the boy should go to that room, could not avail, as the rule respecting promotions provided that they are to be made only, as conditions precedent, on the approval of the board based upon the recommendation of the teacher and superintendent. The testimony showed that neither condition obtained. The superintendent was a subordinate of the board, and any action on his part in regard to promotion, as well as other matters, was required to be "under the advice and direction of the board." The duty, therefore, to "see that all the rules and regulations of the board are enforced," required him, without reference to any expression of individual opinion that he may have given as to the boy's proficiency, to direct the boy to go to the room of the grade to which he had been promoted. So soon as this condition was shown, it became the duty of the court to arrest the evidence and dismiss the realtor's petition. It should be borne in mind, as an obvious and controlling fact, that the statutes impose the duty of the regulation and conduct of all public schools upon the boards of education and not upon the courts, and interference by the courts with the discharge of those duties should not be lightly entered upon.[1]

Demotion on the basis of scholarship.--Once a pupil has been properly promoted to a higher grade and has entered upon the work of that grade, he may be demoted to the next lower grade if he fails to maintain a scholarship standard defined by the local board of education.[2] This principle is illustrated in an Ohio case. A statute provided that the right of every child to attend the public schools was subject to such reasonable rules and regulations as to qualifications of pupils to be admitted and retained in the respective schools as the school committee prescribed. In pursuance of this statute, the school committee of Shelburne adopted a rule to the effect that pupils whose standing was below 60 per cent in two or more subjects should be demoted one grade, and that when such deficiency occurred in the lowest grade taught in any school unit, such pupils should be dropped from the roll of the school. A pupil enrolled in the lowest year of a high school failed to attain the required minimum standard and was accordingly

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[1] Board of Education v. Wickham, 80 Ohio St. 137, 88 N.E. 412 (1909).

[2] Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095 (1913).

excluded from the high school with the suggestion that he enroll in the next lower grade. The court sustained the action by the board.

> The care and management of schools, vested in the school committee, includes the establishment and maintenance of standards for the promotion of pupils from one grade to another and for their continuance as members of any particular class. So long as the school committee act in good faith their conduct in formulating and applying standards and making decisions touching this matter is not subject to review by any other tribunal. It is obvious that efficiency of instruction depends in no small degree upon this feature of our school system. It is an educational question, the final determination of which rests by law in the public officers charged with the performance of that important duty. . . . .
>
> When the real ground for exclusion from a particular school or grade is failure to maintain a proper standard of scholarship and there is opportunity afforded to the pupil to attend another school adapted to his ability and accomplishments, there is no illegal exclusion from school within the meaning of the statute.[1]

Thus, while a pupil may be excluded because of low scholarship from attendance upon any particular unit of the school system, there is no legal authority for excluding him from all school privileges on any such grounds.

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[1] Barnard v. Shelburne, 216 Mass. 19, 102 N.E. 1095, Ann. Cas. 1915A 751 (1913).

CHAPTER VI

RACE AND COLOR AS AFFECTING PUBLIC SCHOOL ATTENDANCE

Constitutional Provisions

More than one-third of the states of the United States have adopted constitutional provisions making race or color a condition affecting public school attendance. Table 6 reveals the nature of these provisions. It is evident from this table that most of the states which have constitutional provisions relating to public school attendance as affected by race or color make the

TABLE 6

CONSTITUTIONAL PROVISIONS CONCERNING RACE AND COLOR AS THEY AFFECT PUBLIC SCHOOL ATTENDANCE

State	Separation Required	No Discrimination Permitted	Equal Advantages for All Races
Alabama.....	x	...	...
Colorado.....	...	x	...
Delaware.....	x	...	x
Florida.....	x	...	x
Georgia.....	x	...	...
Idaho.....	...	x	...
Kentucky.....	x	...	...
Louisiana.....	x	...	...
Mississippi....	x	...	...
Missouri.....	x	...	...
New Mexico.....	...	x[a]	...
North Carolina.	x	...	x
Oklahoma.....	x	...	x
South Carolina.	x	...	...
Tennessee.....	x	...	...
Texas.....	x	...	x
Virginia.....	x	...	...
Washington.....	...	x	...
West Virginia..	x	...	...
Wyoming	...	x	...

[a]Children of Spanish descent.

requirement that children of the colored race shall not be taught in the same school with the children of the white race. Alabama, for example, provides that, "separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race."[1] Five of the states which require separate schools for the two races provide specifically that impartial provision be made for both. One of these states, North Carolina, provides that, "the children of the white race and the children of the colored race shall be taught in separate schools; but there shall be no discrimination in favor of, or to the prejudice of, either race."[2]

It is interesting to note that in every state mentioned in Table 6, with the exception of Missouri, the races are spoken of as "white" and "colored" races. That state provides that, "separate free public schools shall be established for the education of children of African descent."[3] Oklahoma, after using the terms "colored children" and "white children," defines the former as children of the African race and the latter as children of all other races.[4] Further than this, no attempt is made in state constitutions to define who are "colored" or who are "white" children for purposes of school attendance. The only other group of children mentioned in a constitutional provision is the children of Spanish descent. The state of New Mexico has very emphatically provided that:

> Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the state, and they shall never be classed in separate schools . . . . and the legislature shall provide penalties for the violation of this section."[5]

It is further provided that the section cannot be amended except when a three-fourths majority of the total vote in the state and a two-thirds majority of the total vote in each county are cast in favor of such an amendment.

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[1] Constitution of Alabama, Art. XIV, sec. 256.

[2] Constitution of North Carolina, Art. IX, sec. 2.

[3] Constitution of Missouri, Art. XI, sec. 3.

[4] Constitution of Oklahoma, Art. XIII, sec. 3.

[5] Constitution of New Mexico, Art. XII, sec. 10.

Statutory Provisions

Many states have enacted legislation making the race or color of the children of such states a condition affecting public school attendance. Such legislation does not deny any child the right to attend the public schools; it only requires, authorizes, or prohibits the attendance of children in separate schools on the basis of race or color. For the most part, this legislation is applicable to the children of the "white" and "colored" races. All other children are designated by race and never by color. There are only two states which define, by statute, the term "colored." Oklahoma provides that it "shall be construed to mean all persons of African descent who possess any quantum of negro blood."[1] Similarly, a Texas statute defines the terms "colored race" and "colored children" as "all persons of mixed blood descended from negro ancestry."[2] Table 7 presents a general summary of these statutory provisions.

Attendance in Separate Schools Required

Children of white and colored races.--In most of the states making race or color a condition affecting public school attendance, the separation of the children for educational purposes is required. While the statutes in this group of states are uniform in their purpose, the establishment of separate schools, they differ in some of their more specific requirements. In most of these states the statutes make no other requirement than that separate schools shall be established for the children of the white and colored races.[3] For example, the Kentucky

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[1] Oklahoma Statutes, 1931, sec. 7034.

[2] Vernon Texas Statutes, 1936, Art. 2900, p. 637.

[3] Alabama School Code, 1927, Art. 6, sec. 124. Cumulative Supplement to Compiled General Laws of Florida, 1940 Part, sec. 892(28), p. 97. Kentucky Statutes, Baldwin's 1936 Revision, sec. 4399-49. 1937 Laws of Maryland, chap. 552, sec. 200. Mississippi Code, 1930, chap. 163, sec. 65.86. Revised Statutes of Missouri, 1929, chap. 57, sec. 9216. Code of Laws of South Carolina, 1932, sec. 5406. Code of Tennessee, 1934, chap. 2377. Vernon's Texas Statutes, 1936, Art. 2900, p. 637. West Virginia Code, 1937, sec. 1775. Digest of Statutes of Arkansas, 1937, Vol. II, sec. 11535 (c).

TABLE 7

STATUTES CONCERNING RACE AND COLOR AS THEY AFFECT PUBLIC SCHOOL ATTENDANCE

State	Attendance in Separate Schools		
	Compulsory	Authorized	Cannot Be Required
Alabama	x	...	...
Arizona	x[a]	...	...
Arkansas	x	...	...
California	...	x[b]	...
Connecticut	...	...	x
Delaware	x[c]	...	...
Florida	x	...	...
Georgia	x	...	...
Illinois	...	...	x
Indiana	...	x	...
Kansas	...	x	...
Kentucky	x	...	...
Maryland	x	...	...
Massachusetts	...	...	x
Michigan	...	...	x
Minnesota	...	...	x
Mississippi	x	x[d]	...
Missouri	x	...	...
Montana	...	...	x[e]
New Jersey	...	...	x
New Mexico	...	x	...
New York	...	...	x
North Carolina	x[f]	...	...
Oklahoma	x	...	...
Pennsylvania	...	...	x
Rhode Island	...	...	x
South Carolina	x	...	...
Tennessee	x	...	...
Texas	x	...	...
Virginia	x	...	...
West Virginia	x	...	...
Wyoming	...	x	...

[a]Optional in high school when there are 25 or more eligible negro children.

[b]For Japanese, Chinese, and certain Indian children.

[c]For children of Moors, Indians, and colored.

[d]For races other than white or colored races.

[e]Applies to children of Crow Indians only.

[f]Includes separate schools for certain Indian children.

statute makes the single provision that "each board of education shall maintain separate schools for white and colored children."[1]

Other states, however, make the additional requirement that the children of the two races shall be provided with equal educational facilities and advantages.[2] An Oklahoma statute, which illustrates this type of requirement, provides that, "the public schools of the State of Oklahoma shall be organized and maintained upon a complete plan of separation between the white and colored races, with impartial facilities for both races."[3]

The statutes of some of the states which require the establishment of separate schools make it an offense of those in charge of schools if they permit the children of the different races to be given instruction together.[4] The Florida statute is unequivocal on this point. It provides that, "no individual, body of individuals, corporation, or association shall conduct within this State any school of any grade--public, private, or parochial--wherein white persons and Negroes are instructed or boarded in the same building or taught in the same classes or at the same time by the same teachers."[5] Missouri provides that it shall be "unlawful for any colored child to attend any white school, or for any white child to attend a colored school."[6] In Tennessee, "no person shall be employed to teach or have custody over white pupils except persons of the Caucasian race. . . . ."[7]

Among the states requiring separate schools, Arizona has a unique provision which requires separation of races below the high school level but allows the people of a high school district,

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[1] Kentucky Statutes, Baldwin's 1936 Revision, sec. 4399-49.

[2] Revised Code of Delaware, 1935, chap. 71, sec. 9. Code of Georgia, 1933, sec. 32-909. North Carolina Code, 1935, sec. 5384. Oklahoma Statutes, 1931, sec. 7033. Virginia Code, 1936, sec. 680. Revised Code of Arizona, 1928, sec. 1085.

[3] Oklahoma Statutes, 1931, sec. 7033.

[4] Cumulative Supplement to Compiled General Laws of Florida, 1940 Part, sec. 892(28), p. 97. Kentucky Statutes, Baldwin's 1936 Revision, sec. 4363-8.

[5] Cumulative Supplement to Compiled General Laws of Florida, 1940 Part, sec. 892(28), p. 97.

[6] Revised Statutes of Missouri, 1929, chap. 57, sec. 9216.

[7] Code of Tennessee, 1934, chap. 2513, p. 609.

in which there are twenty-five qualified colored pupils, to determine by popular vote whether a separate high school shall be established or whether such pupils shall attend the same high schools as children of the Caucasian race [1] Other states provide specifically for the establishment of high schools for colored pupils but make no provision for any such pupils to attend high schools for children of the white race.[2]

Although some states require that children of the white and colored races be provided separate schools, such separate schools need not be established unless certain conditions are present. Thus, in West Virginia, school boards must establish separate schools when there are ten or more colored children within two miles of a place where a school might be established but may, if they deem it practical, establish a separate school where there are fewer than ten colored children of school age.[3] School districts in which there are eight or more colored children of school age are required, in Missouri, either to establish a separate school for such children or pay their tuition and transportation charges to any school district in the county which maintains a school for colored children; and if the number of such children is less than eight, the district must pay their tuition and transportation to the nearest school maintained for colored children in the county.[4] And in Oklahoma no separate school need be maintained for either race if there are fewer than ten children of either race of school age who can be transferred to schools of their own color in an adjoining district.[5]

Children of other races.--There are only two states which require the establishment of separate schools for children of any race other than those of the colored race. Delaware makes this requirement for children of Moors or of Indians and provides further that neither white children nor colored children may be

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[1] Revised Code of Arizona, 1928, secs. 1011(2), 1085.

[2] 1935 Cumulative Supplement to Code of Maryland, Art. 77, sec. 203. Revised Statutes of Missouri, 1929, chap. 57, secs. 9346, 9347.

[3] West Virginia Code, 1937, sec. 1775.

[4] Revised Statutes of Missouri, 1929, chap. 57, sec. 9217.

[5] Oklahoma Statutes, 1931, sec. 7041.

admitted to such schools.[1] In North Carolina, no child with what is generally known as Croatan Indian blood in his veins is permitted to attend a school for the white race. In certain counties of the state, schools for Croatan Indian children must be established.[2]

Attendance in Separate Schools Authorized

Children of white and colored races.--The statutes in a few states, as shown by Table 7, do not require directly the separation of the children of the two races but do authorize certain designated school authorities to establish separate schools for colored children. Such authorization may be extended to all districts in the state[3] or limited to a specified class or classes of districts.[4] The authority to establish such separate schools is left entirely, in some instances, to local school authorities,[5] but as often it must have the sanction of other school officials, either county[6] or state.[7] In Wyoming, separate schools may be established only when there are fifteen colored children in the district.[8]

Whether pupils of the colored race may be required to attend a separate school established in the discretion of the board, is answered directly in the statutes of but one state, New Mexico. In that state a statute provides that pupils of African descent may not be admitted to the school rooms occupied by pupils of Caucasian or other descent, and that pupils of Caucasian or other

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[1] Revised Code of Delaware, 1935, chap. 71, sec. 9.

[2] North Carolina Code, 1935, sec. 5384.

[3] 1938 Cumulative Supplement to Indiana Statutes, Vol. VI, sec. 28-5104, pp. 174 f. New Mexico Statutes, 1929, chap. 120, sec. 1201. Wyoming Revised Statutes, 1931, sec. 99-332.

[4] General Statutes of Kansas, 1935, chap. 72, sec. 1724.

[5] General Statutes of Kansas, 1935, chap. 72, sec. 1724. 1938 Supplement to Indiana Statutes, Vol. VI, sec. 28-5104.

[6] Wyoming Revised Statutes, 1931, sec. 99-332.

[7] New Mexico Statutes, 1929, chap. 120, sec. 1201.

[8] Wyoming Revised Statutes, 1931, sec. 99-332.

descent may not be admitted to the school rooms provided for those of African descent.[1] It is provided specifically in Indiana that if no separate school is established for colored children, then such colored children shall be allowed to attend the public schools with white children, and that if any colored child completes the highest grade in the school provided for colored children, he or she shall be entitled to enter a school of higher grade provided for white children. And neither may a colored child living in a city of the first class in that state be compelled to attend a school provided for colored children if he resides more than one-half mile nearer a school for white children, unless he is provided free transportation.[2]

Children of other races.--Some states authorize school authorities to provide separate schools for the education of children of races other than the colored race. In Mississippi,[3] for example, a statute provides for the establishment of separate schools for Indian children or children of other races not otherwise provided for by law with educational advantages; and a California[4] statute provides for separate schools for Mongolian, Japanese, Chinese, and Indian children. Schools established exclusively for Indian children in Mississippi must be under the same regulations as the schools provided for the children of other races.

Establishment of separate schools prohibited.--While approximately one-half of the states either require or authorize the establishment of separate schools for children of other races, two states expressly prohibit by statute any establishment of separate schools for such children. The Minnesota statute provides that, "no district shall classify its pupils with reference to race, color, social position, or nationality, nor separate its pupils into different schools or department on any such grounds."[5]

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[1] New Mexico Statutes, 1929, chap. 120, sec. 1201.

[2] 1938 Cumulative Supplement to Indiana Statutes, Vol. VI, sec. 28510-4.

[3] 1938 Supplement to Mississippi Code, 1930, chap. 163, secs. 2569, 6790.

[4] School Code of California, 1937, Div. 3, Pt. 1, chap. 1, art. 1, sec. 3.3, p. 180.

[5] Mason's Minnesota Statutes, 1927, chap. 14, sec. 2999.

After stipulating that all persons of proper age in any school district shall have an equal right to attend any school therein, a Michigan statute further provides that, "no separate school or department shall be kept for any person or persons on account of race or color."[1]

Exclusion on basis of race or color prohibited.--There are still other states, as shown by Table 7, which do not prohibit the establishment of separate schools but which do expressly prohibit by statute the exclusion of any pupil from any public school on account of race or color. For example, a New York statute provides that, "no person shall be refused admission to or be excluded from any public school in the state of New York on account of race or color."[2] In a few instances, the penalty for the violation of such statute is also specified.[3] Such statutes do not necessarily, it appears, prohibit the establishment of separate schools. They may readily be interpreted to mean only that there can be no discrimination on the grounds of race or color. The Illinois statute, for example, provides that no child shall be prevented, on account of race or color, from attending any public school which he is entitled to attend.[4] Obviously he would be entitled to attend a school for colored children were there one in his home district.

Court Decisions

Who Are Colored for Purposes of School Attendance

Many states have enacted legislation concerning the education of colored children without giving any definition of the term "colored" as it applies to school children. A few states use the term "colored race," a few others "negro," and still others "African race." Obviously none of these is very definitive in cases involving children of mixed blood and children of colored

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[1] Compiled Laws of Michigan, 1929, chap. 2, sec. 7368.

[2] Baldwin's New York Consolidated Laws, 1938, sec. 920, p. 124.

[3] Revised Statutes of New Jersey, 1937, sec. 18:14-2, t. 18, p. 91. Illinois Revised Statutes, 1939, chap. 122, sec. 285.

[4] Illinois Revised Statutes, 1939, chap. 122, secs. 284, 285.

races other than negro. Not all "colored" children are "negroes," and not all "negroes" are "colored." Is a child "colored" or "white," an "African" or "Caucasian," when he has one-sixteenth or less of negro blood in his veins? The courts have attempted to answer such questions by considering the popular conception of the term "colored," the proportion of negro blood traceable, the social status of the child's family, and personal appearance. No one of these, as a rule, is applied as the sole criterion in deciding any particular case; each is productive of evidence upon which the final decision is made.

Popular conception.--It has been held that the term "colored," as applied by statutes to individuals, is used in its popular sense and refers to persons of negro blood of whatever degree and not to persons of other blood whose color is not white.[1] In the District of Columbia, an act of Congress provided for separate schools for "colored" children without defining who were colored for the purpose of school attendance. As one of the criteria, though not the determining one, the Court of Appeals referred to the popular conception of the term "colored."

> . . . . the term, being without legislative definition, is left to the import ascribed to it in the common parlance of the people. There is then to be examined whether in the weekday speech of the people the word "colored" bears a significance which should be considered to include this child. That the common use of the word throughout the United States is in no wise significant of mere complexion is quite definitely established by considering the universal habit of the people in their unalterable failure to apply it to the Indian, who is red, the Mongolian, who is yellow, or to the Malay, who is brown; its application to one of these unfair complexions is not any time to be heard; to those of negro blood alone it is ever found to be suited; and then, not depending for the propriety of its application upon a shade of particular blackness, but rather upon an admixture of a particular racial blood, the negro.[2]

However, a more recent Mississippi decision, upheld by the United States Supreme Court, took exception to this rule and held that the term "colored" is not limited to negroes or persons with some admixture of negro blood, but that it means "of a dark skin or

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[1] Wall v. Oyster, 36 App. Cas. (D.C.) 50, 31 L.R.A. (N.S.) 180 (1910). State v. Treadway, 126 La. 300, 52 So. 500, 20 Ann. Cas. 1297 (1910).

[2] Wall v. Oyster, 36 App. Cas. (D.C.) 50, 31 L.R.A. (N.S.) 180 (1910).

non-Caucasian" race.[1] Accordingly, a child of pure Chinese blood was denied admission to a public school established for white children.

Proportion of negro blood traceable.--The courts are reluctant to state specifically what proportion of negro blood should characterize an individual as "colored," and, therefore, ineligible for admission to schools for white children.[2] Some states have enacted laws prohibiting people of the white race from marrying persons who have more than a certain proportion of negro blood in their veins. The children of parents complying with such laws are not necessarily qualified to enter the schools for white children when a statute demands a segregation of white and colored children for school attendance. For example, a man of pure white strain married a woman of less than one-eighth negro blood. The constitution of the state prohibited marriage between persons, one of whom was descended from a negro to and including the third generation. In denying the children of the couple the right to attend schools for white children, the supreme court of the state of North Carolina held that the provision merely "legitimates the offspring of the union, but by no subtle alchemy known to the laboratory of logic can it be claimed to have extracted the negro element from the blood in the veins of such offspring and make it pure."[3]

This case merely follows the well-established rule that, for purposes of school attendance, children are considered "colored" so long as negro blood is traceable.[4] An excerpt from an opinion of the supreme court of Louisiana is a good example of this point of view.

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[1] Rice v. Gong Lum, 139 Miss. 760, 104 So. 105 (1925). Gong Lum v. Rice, 275 U.S. 78, 48 S. Ct. 91 (1927).

[2] Wall v. Oyster, 36 App. Cas. (D.C.) 50, 31 L.R.A. (N.S.) 180 (1910). Tucker v. Blease, 97 S.C. 303, 81 S.E. 668 (1914).

[3] Johnson v. Board of Education, 166 N.C. 468, 82 S.E. 832, L.R.A. 1915A 828 (1914).

[4] Mullins v. Belcher, 142 Ky. 673, 134 S.W. 1151 (1911). State v. Board of Directors of School District No. 16, 154 Ark. 176, 242 S.W. 545 (1922). Tucker v. Blease, 97 S.C. 303, 81 S.E. 668, Ann. Cas. 1916C 796 (1914). Wall v. Oyster, 36 App. Cas. (D.C.) 50, 31 L.R.A. (N.S.) 180 (1910). Moreaux v. Grandich, 114 Miss. 560, 75 So. 434 (1917).

> There is a word in the English language which does express the meaning of a person of mixed negro and other blood, which has been coined for the very purpose of expressing that meaning, and because the word "negro" was known not to express it, and the need of a word to express it made it imperatively felt. That word is the word "colored." The word "colored" when used to designate the race of a person is unmistakable, at least, in the United States. It means a person of negro blood, pure or mixed; and the term applies no matter what may be the proportion of the admixture, so long as the negro blood is traceable.[1]

Physical appearance.--As might be expected, when the rule is applied that a child is colored so long as there is any degree of negro blood traceable in him, some children of mixed blood are denied admission to schools for white children even though in physical appearance they give no indication of being colored. The courts are unanimous, however, in holding that the particular shade of color or lack of color has little or no weight in the determination of who is colored.[2] Thus, children who, judged from their appearance, would pass for persons of pure Caucasian blood, are considered "colored" if they have any trace of negro blood in their veins. In making such a ruling, the supreme court of Arkansas held:

> The purpose and intent of the statute was to prevent social equality or intermingling of the white and African races, thereby maintaining harmony and peace in the public schools. As much confusion and disorder would result from admitting children in the white schools who have a trace of negro in them, though not disclosed by their appearance, as from admitting children who possess a visible and distinct mixture of African blood.[3]

It appears, therefore, that children with a visible admixture of negro blood are "colored" and, that, lacking in such characteristics, they may still be judged colored within the meaning of the law governing school attendance, if it can be shown that they have any degree of negro blood.

Social status.--One further criterion used by some courts in determining whether a child is colored for the purpose of school attendance, is that of the social status of the child's

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[1] State v. Treadway, 126 La. 300, 52 So. 500 (1910).

[2] Tucker v. Blease, 97 S.C. 303, 81 S.E. 668, Ann. Cas. 1916C 796 (1914). Wall v. Oyster, 36 App. Cas. (D.C.) 50, 31 L.R.A. (N.S.) 180 (1910).

[3] State v. Board of Directors of School District No. 16, 154 Ark. 176, 242 S.W. 545 (1922).

family. While this is never used to produce conclusive evidence, the courts have held that a jury may admit any evidence tending to show the relationship which actually exists between the family of the child and families and individuals of the colored race, or between his family and families and individuals of the white race.[1] The clearest expression of this point of view was expressed by the supreme court of South Carolina as early as 1835, and was cited with approval by the same tribunal as late as 1914.

> The status of the individual is not to be determined solely by the distinct and visible mixture of negro blood, but by reputation, by his reception into society, and his having commonly exercised the privileges of a white man. But his admission to these privileges, regulated by the public opinion of the community in which he lives, will very much depend on his own character and conduct; and it may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste. It will be a stimulus to the good conduct of these persons, and security for their fidelity as citizens.[2]

This ruling appears to be somewhat at variance with the established rule that children are "colored" if they bear any degree of negro blood, since it recognizes that children who possess negro blood may be considered white for school purposes, provided they enjoy the social status of white people. It should be pointed out, however, that no case has been determined solely on such grounds. Furthermore, while such evidence is frequently used in proving a child "colored," there is no case on record in which it has been used in proving a child white when it is known that he bears a trace of negro blood.

Discretion of school board in determining who is colored.--Where school boards are empowered to provide separate schools for colored and white pupils, it devolves upon them to determine who are colored pupils and who are white children for purposes of school attendance. While such authority has been questioned, it

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[1] Johnson v. Board of Education, 166 N.C. 468, 82 S.E. 832 (1914). State v. Cantey 2 (Hill) S.C. 614 (1835). Tucker v. Blease, 97 S.C. 303, 81 S.E. 668 (1914). Cole v. District Board of School District No. 29, 32 Okla. 692, 123 Pac. 426 (1912). State v. Board of School Commissioners, 226 Ala. 62, 145 So. 575 (1933).

[2] State v. Cantey, 2 (Hill) S.C. 614 (1835). Tucker v. Blease, 97 S.C. 303, 81 S.E. 668 (1914).

appears to be established that the duty given boards of education to enforce the laws and regulations of the school, vests in them the authority to assign colored children to colored schools and to assign white children to schools for white children; and that when any question arises as to the color of a particular applicant, such authorities may determine it, and the courts will not interfere to control their determination where no abuse of their discretion appears.[1]

Constitutionality of Statutory Provisions Requiring or Authorizing Segregation of Races for School Attendance

As revealed in the analysis of the statutes concerning race and color as they affect public school attendance, many of the states have enacted laws either requiring or authorizing the establishment of separate schools for children of different races. Although such statutes have been attacked many times on the grounds that they violate some provision of the federal constitution, it is well established by both state and federal courts that they constitute no such violation.[2] Specifically, it has been alleged that such statutes violate that section of the Fourteenth Amendment to the federal constitution which prohibits any state from making or enforcing "any law which shall abridge the privileges and immunities of citizens of the United States." Such allegation is not sustained by the courts, the rule being that established in the Slaughter-House cases which held there is a difference between the privileges and immunities of a citizen of the United

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[1] Eubank v. Boughton, 98 Va. 499, 36 S.E. 529 (1900). Black v. Lenderman, 246 S.W. (Ark.) 876 (1923). State v. Board of Directors of School District No. 16, Montgomery Co., 154 Ark. 176, 242 S.W. 545 (1922).

[2] People v. Gallagher, 93 N.Y. 438, 45 Am. Rep. 232 (1883). State v. Albritton, 98 Okl. 158, 224 P. 511 (1923). Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738 (1874). Williams v. Board of Education, 79 Kan. 302, 99 Pac. 216, 22 L.R.A. (N.S.) 584 (1908). People v. School Board, 161 N.Y. 598, 56 N.E. 81, 48 L.R.A. 113 (1900). Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273 (1912). Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 828 (1891). State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713 (1872). Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405 (1874). Gong Lum v. Rice, 275 U.S. 78, 48 S. Ct. 91 (1927). United States v. Buntin, 10 Fed. 730 (1882). Piper v. Big Pine School Dist., 193 Cal. 664, 226 Pac. 926 (1924). Chrisman v. Brookhaven, 70 Miss. 477, 12 So. 458 (1893).

States and the privileges and immunities of a citizen of a state.[1] In line with this decision, state courts have established the rule that the right of a child to attend the public schools does not necessarily result from being a citizen of the United States, but that such right is created by the state and belongs to the citizens of the state as such.[2] For example, a statute providing that separate schools be established for children of African descent and Indian children has been held not to be unconstitutional on any such grounds. The court stated its position clearly.

> It will indeed be readily conceded that the privilege accorded to the youth of the State, by the law of the State, of attending the public schools maintained at the expense of the State, is not a privilege or immunity appertaining to a citizen of the United States as such; and it necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the mere status of citizenship; and it is perhaps hardly necessary to add that assuredly no person can be said to have been deprived of either life, liberty or property, because denied the right to attend as a pupil at such schools, however obviously insufficient and untenable be the ground upon which the exclusion is put.[3]

A more frequent allegation against statutes providing for race segregation in schools is that they violate the provision of the Fourteenth Amendment which declares that no state may "deny to any person within its jurisdiction the equal protection of the law." In other words, the contention is that when pupils of the colored race are compelled to attend a school specifically provided for them and are, at the same time, refused admission to schools established exclusively for white children, they are not receiving equal educational privileges created by law. There is substantial agreement among the courts, however, that statutes requiring or authorizing the establishment of separate but equally advantageous schools for the education of the children of different races do not deny equal protection of the law.[4] Concerning

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[1] Slaughter-House Cases, 83 U.S. 74, 21 L.Ed. 408 (1872).

[2] Lehew v. Brummell, 103 Mo. 546, 11 L.R.A. 828, 15 S.W. 765 (1891). People v. Gallagher, 93 N.Y. 438, 45 Am. Rep. 232 (1883). Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405 (1874). Piper v. Big Pine School District, 193 Cal. 664, 226 Pac. 926 (1924). Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738 (1874).

[3] Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405 (1874).

[4] Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274 (1903). People v. Gallagher, 93 N.Y. 438, 45 Am. Rep. 232 (1883). Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405 (1874). Chrisman v.

such separation a California court has said that,

> . . . . there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other is to be educated upon equal terms with that other, and both at the common public expense.[1]

Again, many of these statutes have been challenged as to their validity in light of the state constitutions guaranteeing equality of rights to all citizens of the state. It is uniformly held, however, that equality of rights does not involve the necessity of educating the children of different races in the same school and that equality of rights does not necessarily imply identity of rights.[2] This ruling is illustrated in a New York case where it was contended that the constitutional provision requiring the legislature to provide for the maintenance and support of a system of free public schools, wherein all the children of the state may be educated, made compulsory the admission of any child to any particular school. In refusing to uphold the contention the court held:

> The most that the Constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated,- not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the Constitution to deprive it of the right to do so. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained. . . . . Nor is there anything in this provision of the Constitution which prevented the legislature from exercising its discretion as to the best method of educating the different classes of children in the state, whether it relates to separate classes, as determined by nationality, color, or ability, so long as it provides for all alike in the character

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Brookhaven, 70 Miss. 477, 12 So. 458 (1893). Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 828 (1891). Piper v. Big Pine School District, 193 Cal. 664, 226 Pac. 926 (1924). Gong Lum v. Rice, 275 U.S. 78, 48 S. Ct. 91 (1927).

[1] Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405 (1874).

[2] People v. School Board, 161 N.Y. 598, 56 N.E. 81, 48 L.R.A. 113 (1900). Chrisman v. Town of Brookhaven, 70 Miss. 477, 12 So. 458 (1893). Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738 (1874).

> and extent of the education which it furnished and the facilities for its acquirement.[1]

It has also been held that such separation is a matter of domestic policy which lies within the legislative discretion. In upholding the constitutionality of a statute authorizing local school authorities to require children of the colored race and children of the white race to attend separate schools, the Supreme Court of Indiana pointed out that,

> . . . . the classification of scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class.[2]

A statute which provides that the children of another race may not attend the public schools of the state if some other agency maintains a school in the state for such children is not valid. Such a statute was enacted by the legislature of the state of California. Indian children were to be excluded from the public schools of the state whenever there was an Indian school maintained by the United States government. The court reasoned to the effect that it is the obligation of the state to furnish equal educational advantages to all regardless of what other agencies may furnish them, and that the denial by the state of such advantages is a violation of the "equal protection" clause of the Fourteenth Amendment to the federal constitution.[3]

The question arises whether, after separate schools have been established, colored children may be denied admission to the schools provided for white children. Where a statute requires separation of the two races for purposes of school attendance, the school authorities have no discretion but to provide for the segregation; and white patrons, it has been held, may compel such authorities to exclude colored children from the school attended by white children.[4] Similarly, where statutes merely authorize school boards to establish separate schools for the children of

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[1] People v. School Board, 161 N.Y. 598, 56 N.E. 81, 48 L.R.A. 113 (1900).

[2] Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738 (1874).

[3] Piper v. Big Pine School District, 193 Cal. 664, 226 Pac. 926 (1924).

[4] Harrison v. Riddle, 44 Ariz. 331, 36 P. (2d) 984 (1934).

white and colored races, such boards may, upon the establishment of separate schools, compel the children of each race to attend the school provided especially for them.[1] This rule, unlike the rule when segregation is required, may be qualified. The school for the children of a particular race must be accessible to them; and where such school is so remote from the residence of the colored children that school attendance is impracticable or burdensome, such children may not be denied admission to schools for white children when these schools are nearer the homes of the colored children.[2] Another qualification of the rule is that when no separate school is established, even though authorized by statute, colored children may not be denied the privilege of admission to the schools attended by children of the white race.[3]

Segregation of Pupils on the Basis of Race or Color without Statutory Authority

While there is complete uniformity among the courts in upholding the validity of statutes authorizing or requiring separation on the basis of race or color, there is some disagreement among them as to whether such separation can be required when there is no specific statutory authority for it. The general rule is, however, that without such authority, school boards have no lawful power to provide separate schools for the education of white and colored children.[4] In Kansas, for example, where a statute authorizes segregation of races in cities of the first class, the supreme court of that state has held that boards of education in cities of the second class do not possess the neces-

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[1] State v. Wirt, 203 Ind. 121, 177 N.E. 441 (1931). People v. School Board, 161 N.Y. 598, 56 N.E. 81, 48 L.R.A. 113 (1900).

[2] United States v. Buntin, 10 Fed. 730 (1882).

[3] State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713 (1872). Piper v. Big Pine School District, 193 Cal. 664, 226 Pac. 926 (1924). Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405 (1874).

[4] Rowles v. Board of Education, 76 Kan. 361, 91 Pac. 88 (1907). Board of Education v. Tinnion, 26 Kan. 1 (1881). Crawford v. Kalmath County School District No. 7, 68 Ore. 388, 137 Pac. 217, Ann. Cas. 1915C 477, 50 L.R.A. (N.S.) 147 (1913). Knox v. Board of Education, 25 Pac. 616, 45 Kan. 152 (1891). Clark v. Board of Directors, 24 Ia. 266 (1868). People v. Board of Education, 18 Mich. 400 (1869).

sary authority to segregate pupils on the basis of color.[1] In so holding the court in one case said:

> If the board has the power, because of race, to establish separate schools for children of African descent, then the board has the power to establish separate schools for persons of Irish descent or German descent; and if it has power, because of color, to establish separate schools for black children, then, it has the power to establish separate schools for red-headed children and blondes. We do not think that the board has any such power. We have conceded, for the purpose of this case, that the legislature has the authority to confer such power upon school boards, but in our opinion the legislature has not exercised, or attempted to exercise, any such authority.[2]

It is evident from the above reasoning that the Kansas court did not disapprove the principle of segregation on the basis of color, but that it did disapprove the authority by which such segregation was effected. This reasoning is in line with the decisions upholding the validity of statutes authorizing or requiring segregation on the basis of race or color.

There are other jurisdictions, however, which, while concurring in the Kansas decisions that school boards may not, without statutory authority, segregate pupils on the basis of color, follow a different line of reasoning. In Michigan[3] and in Iowa[4] it has been held that segregation by school boards constitutes a denial to colored children of equality of rights. In the latter state the supreme court has held:

> . . . . all the youths are equal before law, and there is no discretion vested in the board of directors or elsewhere, to interfere with or disturb that equality. The board of directors may exercise a uniform discretion equally operative upon all, as to residence, or qualification, or freedom from contagious disease, or the like, of children, to entitle them to admission to each particular school; but the board cannot, in their discretion, or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing, or the like.[5]

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[1] Board of Education v. Tinnion, 26 Kan. 1 (1881). Cartwright v. Board of Education, 72 Kan. 629, 88 Pac. 382 (1906). Rowles v. Board of Education, 76 Kan. 361, 91 Pac. 88 (1907).

[2] Board of Education v. Tinnion, 26 Kan. 1 (1881).

[3] People v. Board of Education, 18 Mich. 400 (1869).

[4] Clark v. Board of Directors, 24 Ia. 266 (1868).

[5] Clark v. Board of Directors, 24 Ia. 266 (1868).

Such reasoning, it should be observed, is contrary to the reasoning of the courts in upholding the validity of statutes which authorize or require segregation. The two rulings cannot be reconciled, for segregation has the same effect upon the rights of pupils whether done with or without statutory authority.

There is some evidence that segregation of races for school attendance may be required by school boards in the absence of specific statutory authority.[1] The city of Boston established separate schools for colored children and admitted such children to separate schools only. A colored pupil sought admission to a school maintained exclusively for the instruction of white children. In holding that the authority vested by statute in school boards to make all rules and regulations necessary for the conduct of the school was sufficient authority for classifying the pupils on the basis of color, the court reasoned:

> In the absence of special legislation on this subject the law has vested the power in the committee to regulate the system of distribution and classification, and when this power is reasonably exercised, without being abused or perverted by colorable pretenses, the decision of the committee must be deemed conclusive. The committee, apparently upon great deliberation, have come to the conclusion that the good of both classes of schools will be best promoted by maintaining the separate primary schools for colored and for white children, and we can perceive no good ground to doubt that this is the honest result of their experience and judgment.[2]

While, as stated above, this case furnishes some authority that school boards may segregate pupils on the basis of color without any specific statutory authority, it has never been followed by other jurisdictions in deciding cases under similar circumstances. It is, however, often cited with approval in cases testing the validity of statutes authorizing segregation. In such cases it is implied that school boards would have the power to segregate on the basis of color even if there were no statute authorizing them to do so.[3]

Where statutes expressly prohibit the denial of school privileges on the basis of race or color, boards of education do not have the authority to refuse the colored children of the dis-

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[1] Roberts v. City of Boston, 5 Cush. (Mass.) 198 (1849).

[2] Roberts v. City of Boston, 5 Cush. (Mass.) 198 (1849).

[3] State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713 (1872). People v. Gallagher, 93 N.W. 438, 45 Am. Rep. 232 (1883).

trict admission to the schools for white children even though the district does maintain schools for colored children.[1] Admitting that school boards have broad discretionary power in the management of schools, the courts, under the guidance of such statutes, hold that local school authorities have no power to discriminate between pupils on any such basis.

Providing Equal Educational Opportunities

While it is well established that state legislatures may provide that children of different races be educated separately, it is equally well established that when such separation is effected, all classes of children must be afforded substantially equal educational opportunities.[2] Unless this principle of equality is adhered to, there is, of course, discrimination between the children of the two races, and one group or the other is denied equal protection of the law. In determining whether any one group, white or colored, is discriminated against in their educational opportunities, the courts have found it necessary to consider several allegations of inequality.

Remoteness of school building.--That the children of one race may be compelled to travel a greater distance to reach the school building than the children of another race, does not constitute discrimination against the children travelling the greater distance. For it is well established that the matter of nearness or remoteness of the schoolhouse to the homes of the children is not a factor to be considered in determining whether equal educational advantages are offered.[3] Though the greater distance

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[1] Chase v. Stephenson, 71 Ill. 383 (1874). Kaine v. Mana-way, 101 Pa. St. 490 (1882). People v. Board of Education, 127 Ill. 613, 21 N.E. 187 (1889).

[2] Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540 (1885). Williams v. Board of Education, 79 Kan. 202, 99 Pac. 216 (1908). Crawford v. School District, 68 Ore. 388, 137 Pac. 217 (1913). Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 828 (1891). People v. Gallagher, 93 N.Y. 438, 45 Am. Rep. 232 (1883). Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273 (1912). McFarland v. Goins, 96 Miss. 67, 50 So. 493 (1909). County Board of Education of Meade County v. Bunger, 240 Ky. 155, 141 S.W. (2d) 931 (1931). Burnside v. Douglas School District No. 27, 33 Ariz. 1, 261 Pac. 629 (1927).

[3] People v. Gallagher, 93 N.Y. 438, 45 Am. Rep. 232 (1883). Lehew v. Brummell, 183 Mo. 546, 15 S.W. 765, 11 L.R.A. 828 (1891).

may work a hardship upon some children, such hardship, it is held, may arise from many causes and is often occasioned by the parents' conveniences and necessities. Furthermore, it is pointed out, that, by the very nature of things, school buildings cannot be located equidistant from all patrons. The following excerpt from an opinion by the New York court illustrates the reasoning of the courts on this point.

> It is quite impracticable for the authorities to take into account and provide for the gratification of the taste, or even the convenience, of the individual citizen in respect to the place or conditions under which he shall receive an education. In the nature of things one pupil must always travel further to reach a fixed place of instruction than another, and so, too, the resident of one district is frequently required to go further to reach the school established in his own district than a school in an adjoining district; but these are inconveniences incident to any system, and cannot be avoided. It is only when he can show he is deprived of some substantial right, which is accorded to other citizens and denied to him, that he can successfully claim that his legal rights have been invaded.[1]

But where a school board compels a colored child to attend a school so far removed from his residence as practically to deny him school privileges, it has been held that equal educational advantages are not provided.[2]

Size of school buildings.--Neither is the rule of equality violated when the children of the white race are provided with larger and more imposing school buildings than are the children of other races. Schoolhouses need not be identical in order to furnish equal educational facilities.[3]

Danger of access.--The mere fact that the children of the colored race may be compelled to cross railroad tracks to reach the schoolhouse, while children of the white race are not compelled to do so, does not violate the requirement for equality of educational opportunity, since, as pointed out by the court, steam railways are no more hazardous than other instruments of transpor-

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Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273 (1912).

[1] People v. Gallagher, 93 N.Y. 438, 45 Am. Rep. 232 (1883).

[2] United States v. Buntin, 10 Fed. 730 (1882).

[3] Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274 (1903). Lowery v. Board of Graded Trustees, 140 N.C. 33, 52 S.E. 267 (1905).

tation.[1] But when the school for one race is not accessible except at a great risk of life, as where children are compelled to cross numerous railroad tracks on which many trains pass daily, the educational opportunities are not equal, and the board of education in so locating the schoolhouse has abused the discretionary power vested in it.[2]

Distribution of funds.--The contention has been made that the length of the school term for each of the two races should be based on the proportion which the number of children of each race bears to the total number of children of both races to be educated. The courts are agreed, however, that such a distribution of funds works a discrimination against one race or the other.[3] For example, in Arkansas the directors of a school district in which the number of colored children was less than one-third of the total number of school children, undertook to use this ratio as a basis for fixing the length of the school term for the children of each of the two races. In holding that this constituted discrimination in the distribution of school funds, the court said:

> The opportunity of instruction in the public schools, given by the statute to all the youths of the state, is in obedience, as we have seen, to the special command of the Constitution, and it is obvious that a board of directors can have no discretionary power to single out a part of the children by the arbitrary standard of color, and deprive them of the school privilege. To hold otherwise would be to set the discretion of the directors above all law. If they may lawfully say to one race you shall not have the privilege which the other enjoys, they can abridge the privileges of either until the substantive right of one or both is destroyed.[4]

In line with this reasoning, it has been held that colored children in separate schools must be provided the length of school term stipulated by statute, even though it costs many times in proportion what the white school costs.[5]

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[1] Dameron v. Bayless, 14 Ariz. 180, 126 P. 273 (1912).

[2] Williams v. Board of Education, 79 Kan. 202, 99 Pac. 216, 22 L.R.A. (N.S.) 584 (1908).

[3] Williams v. Board of Education, 45 W. Va. 199, 31 S.E. 985 (1898). Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540 (1885). Williams v. Bradford, 158 N.C. 36, 73 S.E. 154 (1911). Fall v. Read, 193 Ky. 135, 238 S.W. 177 (1922).

[4] Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540 (1885).

[5] Williams v. Board of Education, 45 W.Va. 199, 31 S.E. 985 (1898).

Closely related to this phase of distribution of school funds is the segregation of the property of white and colored citizens for purposes of taxation for the support of schools. The attempt has been made, by legislative enactment, to tax the property of white citizens for the support of schools for white children and to tax the property of colored citizens for the support of schools for colored children. Most courts agree that such segregation of property for taxation purposes discriminates against the colored race.[1] The supreme court of North Carolina, for example, has held that such legislation violates that section of the state constitution which provides that, "there shall be no discrimination in favor of or to the prejudice of either race." In so holding the court reasoned:

> Nor can we shut our eyes to the fact that the vast bulk of property, yielding the fruits of taxation, belongs to the white people of the State, and very little is held by the emancipated race; and yet the needs of the latter for free tuition, in proportion to its numbers, are as great or greater than the needs of the former. The act, then, in directing an appropriation of what taxes are collected from each class, to the improved education of the children of that class, does necessarily discriminate "in favor of one to the prejudice" of the other race.[2]

In Kentucky a statute authorized two or more school districts to consolidate and tax the property of white people for the establishment of a high school for white children. A federal district court in that state held such a statute to be a violation of the equal protection clause of the Fourteenth Amendment to the federal constitution. The contention settled by the court was that equal protection did not mean equal benefits. The court refused to sustain the contention.

> The equal protection of the laws is not possible if taxes levied and collected for governmental purposes are divided on any such basis. The equal protection of the laws guaranteed by this amendment must and can only mean that the laws of the state must be equal in their benefits, as well as in their burdens, and that less would not be the equal protection of the laws. This does not mean absolute equality in distributing the benefits of taxation. This is impracticable.

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[1] Puitt v. Commissioners of Gaston County, 94 N.C. 709, 55 Am. Rep. 638 (1868). Claybrook v. City of Owensboro, 16 Fed. (Ky.) 297 (1883). Davenport v. Cloverport, 72 Fed. (Ky.) 689 (1896). Mc Farland v. Goins, 96 Miss. 67, 50 So. 493 (1909).

[2] Puitt v. Commissioners of Gaston County, 94 N.C. 709, 55 Am. Rep. 638 (1886).

> But it does mean the distribution of the benefits upon some fair and equal classification or basis.[1]

There is some authority, however, that such statutes are valid. In Kentucky, a statute providing that the revenue derived from the tax on the property of white people should be used for the maintenance of schools for white children, and that the revenue raised by a tax on the property of colored people should be used for the maintenance of schools for colored children, was held by the Court of Appeals of that state not to be a violation of either the constitution of the state of Kentucky or the Fourteenth Amendment to the federal constitution.[2] But the same court, a few years later, declared unconstitutional a statute which forbade the expenditure of funds raised by a tax on the property of white people for schools maintained for colored children, and likewise, the use of funds derived from a tax on property of colored people for schools maintained for white children. The point in this case, however, was whether the white school should receive all the revenue collected from taxes levied on corporations. The court held that corporations were neither white nor black.

> There appears to be no more reason to assert that a corporation belongs to the white or Caucasian race than to declare it to be of the African or negro race. It may be that most of the stockholders, or perhaps all of the stockholders, of a given corporation are white, yet these individual stockholders are separate and distinct from the corporation itself. The artificial person has a separate entity, recognized in law, distinct and apart from the stockholders or directors who organize and conduct the company or own its stock.[3]

The school revenue derived from a tax on corporate property, according to this ruling, must be "apportioned between the two schools in the ratio of the pupil children of each to the whole."

Discretion of school authorities in determining when equal facilities are provided for both races.--If equal educational opportunities are to be provided, there must be some authority for determining when such conditions have been met. The power to make such determination lies within the discretion of the local school authorities, whose duty it is to provide all school facili-

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[1] Claybrook v. City of Owensboro, 16 Fed. (Ky.) 297 (1883).

[2] Crosby v. Mayfield, 133 Ky. 215, 117 S.W. 316 (1909).

[3] Trustees of Graded Free Colored Common Schools of City of Mayfield v. Trustees of Graded Free White Common Schools of City of Mayfield, 180 Ky. 574, 203 S.W. 520 (1918).

ties. Since conditions vary from one school community to another and from time to time in the same locality, it is only proper that these local school authorities be given rather broad discretion in determining whether equal advantages are provided for the children of the two races. On this point the Supreme Court of North Carolina has said:

> Much must be left to the good faith, integrity and judgment of local boards in working out the difficult problem of providing equal facilities for each race in the education of the children of the State. Local conditions, relative numbers, and other well recognized factors enter into the problem, and must be dealt with in a spirit of justice to all concerned, and to promote the honor and welfare of the State.[1]

Thus, it becomes evident, that if separate school facilities are provided for the children of the different races, such facilities must be, as determined by local school authorities, substantially equal for all races.

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[1] Lowery v. Board of Graded School Trustees, 140 N.C. 33, 52 S.E. 267 (1905).

CHAPTER VII

RESIDENCE REQUIREMENTS FOR PUPILS ATTENDING PUBLIC SCHOOLS

The residence of pupils who desire to attend the school or schools of any particular school district is a persistent problem which confronts those who administer schools. Even though constitutional and statutory provisions legalize the creation of schools for the children residing in any state or district, it is often difficult to determine when such children have established residence for school purposes.

Residence as Provided for by State Constitutions

There are no states which define by constitutional provision what is meant by residence for school purposes. A majority of them merely state that free schools shall be established for all children of the state. Others provide only that education shall be encouraged, while a few provide that a system of free public schools shall be established but do not state who may attend such schools. However, it is a reasonable inference that education is encouraged and schools provided for the children of the state when they are otherwise qualified.

It appears, therefore, that the constitutional provisions relating to residence do no more than to create a right for children, in any state, to attend the public schools of such state.

School Residence as Defined by Statute

Comparatively few states have attempted, through legislative enactment, to define what constitutes residence for school purposes. And only a small number of these makes any attempt to formulate a concise definition of the term. Most of them stipulate the detailed conditions under which school residence may be acquired.

School residence as legal residence of parents or guardians.-- Some states limit residence for school attendance to the

legal residence of the parents or guardians. This is a narrow conception of the term and is found in the statutes of only eight states.[1] Some of these make exceptions by stating specific conditions under which other pupils may be admitted to the schools in the various districts of the state. Apparently most legislatures are cognizant of the difficulties which would likely arise in attempting to restrict the school residence of children to the legal residence of parents or guardians.

School residence of children in charitable institutions.--The different types of charitable institutions under the auspices of the state or private organizations create a problem with reference to school residence. The question is not whether such children shall be admitted to the schools of the district in which such charitable institutions are situated, but rather as to whether they are residents for school purposes in the sense that they may be admitted without tuition charge.

There are five states in which the inmates of an institution established for the care of dependent children may attend the schools of the district in which such institutions are located without the payment of tuition.[2] Four of these five states qualify such provisions. Michigan permits districts of attendance to collect tuition for children cared for at the expense of any county.[3] After making the provision permissive, North Carolina provides that three-fourths of the extra expense incurred for teaching children from charitable institutions may be paid out of the county fund.[4] In Ohio the board of education of any district,

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[1] Revised Code of Arizona, 1928, sec. 1075, p. 239. General Statutes of Connecticut, 1930, sec. 1003, p. 340. Idaho Code, 1932, sec. 32-606, p. 659. Mason's 1935 Supplement to Compiled Laws of Michigan, 1929, sec. 7679, p. 592. Nevada Compiled Laws, 1929, 1938 Pocket Part, sec. 5776. Harlow's Supplement to Oklahoma Statutes, 1931, sec. 7056n, p. 416. Public Laws of Vermont, 1933, sec. 4244, p. 708. Purdon's Pennsylvania Statutes, 1934, sec. 1372.

[2] 1939 Supplement to General Statutes of Connecticut, sec. 267e, p. 146. Mason's 1935 Supplement to Compiled Laws of Michigan, 1929, sec. 7679, p. 592. North Carolina Code, 1935, sec. 5446, p. 1883. Throckmorton's Ohio Code Annotated, 1940, sec. 7676, p. 698. Purdon's Pennsylvania Statutes, 1936, sec. 1381, p. 1084.

[3] Compiled Laws of Michigan, 1929, sec. 7425, p. 2705.

[4] North Carolina Code, 1935, sec. 5446, p. 1883.

wherein is located a private children's home, may admit inmates with or without payment of tuition fees.[1] Pennsylvania leaves the matter of admission of such children to the discretion of the local school board.[2]

There are other states, however, which provide rather explicitly that children committed to orphans' homes are to be admitted to the schools of the districts in which such homes are located on the same basis as all other non-resident pupils.[3] A New York statute illustrates this type of legislation.

> Children cared for in a duly incorporated orphan asylum or other institution for the care, custody and treatment of children, other than the children of the officers and employees of such institution shall not, by reason of their presence in such institution, be deemed to be residents of the school district in which such institution is located. The trustees or other authorities in charge of any such institution may contract with the trustees or board of education of the school district in which such institution is located for the secular instruction of such children. . . . .[4]

It appears, therefore, that only one-fourth of the states commit themselves through statutory enactment, as to the residence for school purposes of children living in various types of charitable institutions. Eight of these do not consider such children residents for school purposes and the four which admit them free of charge make one or more exception to the general rule and charge tuition. Generally speaking, it may be said that states which have enacted legislation concerning the school residence of children committed to orphan asylums do not place the burden of educating such children upon the school districts in which such institutions are located.

Residence of children in family homes.--A closely related problem to that of the school residence of children living in charitable institutions is the school residence of children living

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[1] Ohio Code Annotated, Baldwin's 1940 Revision, sec. 7681.

[2] Purdon's Pennsylvania Statutes, 1936, sec. 1381, p. 1084.

[3] General Statutes of Connecticut, Revision of 1930, sec. 1015, p. 344. Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-3712. Code of Iowa, 1939, sec. 4283, p. 710. General Statutes of Kansas, 1935, sec. 39-331, p. 941. General Laws of Massachusetts, 1932, secs. 7, 11, pp. 892 f. Session Laws of North Dakota, 1927, secs. 1, 2, 3, p. 402. Wisconsin Statutes, 1939, sec. 40.21.

[4] Baldwin's New York Consolidated Laws, 1938, sec. 567(4).

in boarding homes to which they have been assigned by welfare agencies or courts, and children, whose parents or legal guardians are unable to contribute to their support, living with families free of charge in districts other than the legal residence of their parents or guardians. Several states have enacted legislation to meet these situations.

In Michigan all such children are considered residents, for educational purposes, of the school district where the homes in which they are living are located except that children in the custody of licensed homes may be denied admission if the school facilities are inadequate.[1] Statutes in North Carolina and Connecticut provide that any child received into the home of any person residing in the district as a member of the family who receives board and other support free of cost is a resident for school purposes.[2] In New York, children cared for in free family homes and children cared for in "family homes at board" are deemed residents of the district where the families reside, provided such children have been removed from the custody of their parents by order of the children's court.[3] In the same section, however, it is provided that all other children cared for in "family homes at board" shall not be deemed residents of the district in which such families live, but that they shall receive free tuition in the schools of the district unless their admission imposes an unreasonable additional operating cost on the school district. Pennsylvania has provisions almost identical with those of New York.[4] Both Iowa and New Hampshire provide that where children live in boarding homes operated for gain the school districts in which such homes are located may charge tuition for such children.[5]

It is apparent that those states which have enacted legislation defining the school residence of children living in

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[1] Mason's 1935 Supplement to the Compiled Laws of Michigan, 1929, sec. 7680, p. 592.

[2] The North Carolina Code, 1935, sec. 5661, p. 1923. 1939 Supplement to General Statutes of Connecticut, sec. 267e, p. 146.

[3] Baldwin's New York Consolidated Laws, 1938, sec. 567(5).

[4] Purdon's Pennsylvania Statutes, 1936, sec. 1372, p. 1082.

[5] Code of Iowa, 1939, sec. 4283.01, p. 710. Laws of State of New Hampshire, Session of 1927, chap. 58, sec. 1, pp. 74 f.

family homes deem them residents for school purposes if such homes do not charge for their support. Usually, if children are kept in family homes for gain they are considered non-residents and the district of attendance may collect tuition.

Admission of children of parents in the service of the United States.--The school attendance of children of parents entering into the service of the United States has been a subject for legislation in several of the states. In Virginia, children of persons residing on any federal military or naval reservation may attend, free of charge, the school in the county or city where such reservation is located.[1] A Nebraska statute admits children of enlisted men and officers of the United States Army, Navy or Marine Corps on duty in that state to the schools in, near or adjacent to the place where such parents are on duty without the payment of tuition fees.[2] Indiana and Vermont make very similar provisions to those of Nebraska except that the school districts in which the children attend school may collect tuition fees from the state.[3] In Maine, arrangements for the education of children residing with parents or legal guardians at any light station, fog warning station, or other government reservation, may be made by state school officials in co-operation with the United States government.[4]

Apparently not many state legislatures have considered it necessary to enact legislation defining the school residence of children of parents employed by the government of the United States. In the few states which have done so, such children are invariably admitted to the schools in the districts of the state in which their parents are on duty, either at the expense of such districts or of the state.

Other provisions concerning residence.--The attempt to define residence for school purposes by describing the specific conditions under which it may be required has resulted in various

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[1] Virginia Code, 1936, chap. 33, sec. 682, p. 181.

[2] 1939 Cumulative Supplement to Compiled Statutes of Nebraska, 1929, sec. 79-521, p. 665.

[3] Annotated Indiana Statutes, 1933, sec. 28-3716, p. 844. Acts and Resolves, State of Vermont, 1939, sec. 1, p. 107.

[4] Revised Statutes of the State of Maine, 1930, sec. 136.

statutory provisions which do not lend themselves to definite classifications. In Missouri, for example, orphans and apprentices of school age, children with only one parent living and children whose parents do not contribute to their support, if they are unable to pay tuition, have the privilege of attending school in any district in the state in which they may have either a permanent or temporary home.[1] The two states of Ohio and Oklahoma classify as residents for school purposes any children who entirely support themselves by their own efforts.[2] In Colorado, at the discretion of the school board, any pupil who needs to be in the district in order to have a home and the necessities of life may have the privileges of the school in such district.[3] Children living temporarily in school districts in Massachusetts and Oklahoma are not residents for school purposes.[4] Maine not only permits children living with parents who reside temporarily in a school district to attend the schools but makes them subject to the attendance laws in force in the district.[5] Every person of school age maintained as a public charge in Wisconsin is deemed a resident of the school district in which he resides, but the district is compensated by the governmental unit administering poor relief.[6] In Nebraska children become bona fide residents of the school district to which their parents or guardians remove when they enter into the public service of the state.[7]

Such detailed provisions are further evidence that state legislatures, as a rule, prefer to define residence of children for school purposes by describing specific situations which may arise, rather than to formulate a concise definition of the term.

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[1] Revised Statutes of State of Missouri, 1929, sec. 9207.

[2] Ohio Code Annotated, Baldwin's 1940 Revision, sec. 7681. Harlow's Supplement to Oklahoma Statutes, 1931, sec. 7056m.

[3] 1935 Colorado Statutes Annotated, 1939 Cumulative Supplement, Art. 6, sec. 89.

[4] Tercentenary Edition of General Laws of Massachusetts, Vol. I, chap. 76, sec. 6, p. 892. Harlow's Supplement to Okla. Statutes, 1931, sec. 7056m.

[5] Revised Statutes of the State of Maine, 1930, sec. 30.

[6] Wisconsin Statutes, 1939, sec. 40.21, p. 504.

[7] Compiled Statutes of Nebraska, 1929, chap. 79, sec. 504.

They also furnish additional evidence that the several states are vitally concerned that all children living within the borders of any state shall enjoy the opportunity of a free education.

Residence as Defined by Court Decisions

There is some conflict among the decisions of the supreme courts of the different states on the subject of school residence. Indeed opinions differ so widely that few unqualified statements can be made. Since any of the states will, by statute, admit resident pupils of a district to the schools of the district, it is necessary only to ascertain how the term "residence" is construed in the different states and the conditions under which one may acquire such residence.

The term "residence," as used in the school laws, may mean either legal residence, which is equivalent to domicile, or actual residence, which is practically synonymous with habitation. The conditions under which either of these is acquired vary among the different states.

Legal domicile as a basis of residence for school purposes.--There is a tendency, especially among the older decisions, to restrict residence to its narrow and technical meaning. That is, residence is used synonymously with the term legal domicile. When so defined residence for school purposes is the same as residence for purpose of taxation or suffrage. This means that minor children have no residence other than the domicile of their parents or guardians.

Such a condition probably has been brought about by the policy of the legislatures of several states which makes it mandatory upon the local school district to establish and maintain a school for the education of the children of the inhabitants of the district. This has led some people to look upon education as a local function so far as its support is concerned and to take the view that the obligation of the district is discharged when educational facilities are provided for the children, otherwise eligible, who are bona fide residents of the school district.

There are several jurisdictions which uphold the conception that residence for school purposes is not different from the residence required, for purposes of taxation or suffrage.[1] It

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[1] Gardner v. Board of Education, 5 N.Dak. 259, 38 N.W. 433

has been held, for example, that a parent cannot gain school residence for his children in one district while at the same time maintaining a legal residence or domicile in another. In one such case the parent had rented a house in a town adjoining the town in which he owned a farm and lived for many years. He, with his family, moved into this rented house during the school year. At the end of each school year the furniture was stored in the rented house and the family went to live on the farm. The parent claimed that these conditions were sufficient to establish a residence for school purposes even though he was assessed and was an office holder in the town in which his farm was located.[1]

Children committed on probation by a juvenile court have been denied admission to the schools of a district in which they lived with residents of the district. A statute fixed the residence of a child in the district in which his parent or guardian resided, but the juvenile act provided that a dependent child awarded by it should become the ward of the one to whose care it was committed. The court in upholding the exclusion reasoned:

> The relation between each custodian and the child in his care is one of strict business on the part of the custodian, and was assumed by him for the express purpose of earning a livelihood. Not a single feature of the relation of parent and child as universally understood, can be said to exist. . . . . The dependent and incorrigible children committed to the custody of residents of the school district of Glenfield borough are physically present in that district, but they are not even voluntarily so present. Their physical presence is an enforced one; but, whether voluntary or compulsory, it is not a legal residence in the district.[2]

However, it is not alone the older decisions which restrict residence of children for school purposes to that of the legal residence of parents. In 1925, the New Jersey Supreme Court held that, a child, in law, can have no residence of its own and can only lawfully acquire one when it has been emancipated and chooses a place of residence of its own. The court also held

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(1888). Wheeler v. Burrow, 18 Ind. 14 (1862). School District v. Patterson, 10 Mont. 17, 24 P. 698 (1890). Board of Education v. Foster, 116 Ky. 484, 76 S.W. 354, 3 Ann. Cas. 692 (1903). Black v. Graham, 238 Pa. St. 381, 86 Atl. 266 (1913). Sulzen v. School District, 144 Kan. 648, 62 P. (2d) 880 (1936).

[1] Board of Education v. Crill, 149 N.Y. App. Div. 407 (1911).

[2] Black v. Graham, 238 Pa. 381 (1913).

that it was a state policy to confine the attendance of children to the public schools in the respective districts where their parents or guardians reside.[1] And as late as 1936, the highest court in Kansas made a similar ruling. The case arose when three minor children residing with their mother in a school district on property owned by the parents were excluded from the schools of that district on the basis of non-residence. They lived in this district during the time school was in session and spent the remainder of the year with the father who owned and operated a farm in another district. The court reasoned that since the father had no legal domicile in the district of attendance and since, "a wife's residence or domicile follows that of her husband," the children could have no residence other than that of the father and, therefore, were not entitled to free school privileges in the district in which they lived with their mother.[2]

Actual residence as a basis for school attendance.--On the other hand, there is an increasing number of jurisdictions which hold that legal residence or domicile is not required but that actually being in or living in a school district constitutes residence for school purposes. This change in point of view is probably due to changed social conditions. Education is more and more looked upon as a necessary prerequisite to good citizenship. As a result, states are interested in the education of all children who live within the borders of any school district. Many courts appear to recognize this situation by declaring that actual residence is sufficient to establish the right to attend the public schools of a particular district.[3] For example, in a case

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[1] Mansfield Tp. Bd. of Ed. v. State Bd. of Ed., 129 A. 765 (1925).

[2] Sulzen v. School District, 144 Kan. 648, 62 P. (2d) 880 (1936).

[3] State v. Selleck, 76 Neb. 747, 107 N.W. 1022 (1906). People v. Hendrickson, 104 N.Y.S. 122 (1907). State v. Thayer, 74 Wisc. 48, 41 N.W. 1014 (1889). Public School v. Wright, 176 Mich. 6, 141 N.W. 866 (1913). State v. Clymer, 164 Mo. App. 678, 147 S.W. 1119 (1912). Mizner v. School District No. 11 of Sherman Co., 2 Neb. 238, 96 N.W. 128 (1901). Board of Education v. Hobbs, 8 Okla. 293, 56 Pac. 1052 (1899). School District v. Pollard, 55 N.H. 503 (1875). State v. Board of Education, 96 Wisc. 95, 71 N.W. 123 (1897). Shaw v. Small, 125 A. 496, 124 Me. 36 (1924). Mt. Hope School Dist. v. Hendrickson, 197 N.W. 47, 197 Iowa 191 (1924). Wirth v. Board of Education for Jefferson Co., 262 Ky. 291, 90

where a child had gone to live with relatives in another state from that in which her parents lived, the court reasoned in part:

> The state is interested to have all children educated in order that they may become good citizens. Experience has demonstrated that it costs the public much more to support one ignorant or vicious person than to educate many children. On the simple ground of economy, the state cannot afford to permit any child to grow up without being sent to school. . . . . If any child is actually dwelling in any school district, so that some person there has the care of it, and is within the school age . . . . and is not instructed elsewhere, then that child must go to the public school.[1]

Further illustration of this same rule is found in People v. Hendrickson. A child had been placed by the Brooklyn Children's Aid Society in a home outside the city of Brooklyn. The society paid for his board and clothes. Otherwise he was in control of the persons with whom he lived. In declaring the child to be a resident of the district for school purposes the court held:

> Families are broken up and scattered by the necessities of obtaining a livelihood, by death of one or both parents, or by abandonment of offspring. Such children, as all others are wards of the state to the extent of providing for their education. To secure these ends the law relating to public schools must be interpreted. Their dominate purpose is that all the children of the state shall have an opportunity for free education, and the language of the statute in relation to residence is to be construed with this purpose in view, rather than in the narrow spirit in which such expression occurs in statutes which relate to voting and administration of estates.[2]

It has been held that the same principle holds even though the parents move into a school district for occupational reasons but continue their legal residence in their former district and vote there regularly. In holding the child of such parents a resident for school purposes the court reasoned in part:

> The state endeavors to foster and encourage education. It wants every child within its limits to have equal opportunity with other children in the free privileges of the public schools. And while the theory of the school law is that

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S.W. (2d) 62 (1936). Fangman v. Moyers, 8 P. (2d) 762, 90 Colo. 308 (1932). Anderson v. Breithbarth, 62 N.D. 709, 245 N.W. 483 (1932). Kidd v. Joint School District No. 2, 194 Wisc. 353, 216 N.W. 499 (1928).

[1] Yale v. West Middle School District, 59 Conn. 489, 13 L.R.A. 161, 22 Atl. 295 (1890).

[2] People v. Hendrickson, 104 N.Y.S. 122, 54 Misc. 337 (1907).

> a child is restricted to these free privileges to the district in which it resides, it is not intended that it must acquire a residence in that district in the technical sense of the term. In recognition of this policy of the state and the necessities of children for a free education, the courts construe the school laws liberally, and distinguish residence from domicile in its technical sense.[1]

Likewise, parents in the public service of the state may send their children to the school of the district in which such service is rendered even though they retain their legal residence elsewhere. Such a ruling was made in Nebraska where the children of the governor and superintendent of public instruction were denied the right to attend the public schools of the city of Lincoln on the grounds that they were not residents of the district. The statutes provided that children whose parents or guardians lived within the district were, if otherwise qualified, entitled to attend the schools of the district without charge. However, the same statute gave the control and direction of the school of the district to the board of education. The court in holding that the children were residents said in part:

> Our school law does not contemplate that families will be broken up for the purpose of sending children to the common schools. It was necessary for these officers to be at the state capital, and the allegations of the petition show that they live in Lincoln within the meaning of the school law.[2]

A clear pronouncement of the principle that living in a district is sufficient to acquire residence for school purposes is found in a Nebraska decision. The case arose over the residence of a child who had been sent by her parents to make her home permanently with relatives. In holding the child to be entitled to the privilege of the school in the district in which her relatives lived, the court said:

> It is true that the home of a child is usually with its parents, but this is not always the case. A guardian may be appointed for a child whose parents are living, and in such case, if the child resides with the guardian, the residence of the guardian would be the residence of the child. So, too, a child may be adopted, and the residence of its adopted parents would be the residence of the child. Where, as in this case, the child, with the consent of her parents, goes to live

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[1] School District No. 1 Fractional of Mancelona Tp. v. School District No. 1 of Custer Tp., 236 Mich. 677, 211 N.W. 60 (1926).

[2] State ex rel. Mickey v. Selleck, 76 Neb. 747, 107 N.W. 1022 (1906).

> in the family of another as a member of the family, and under an agreement that this is to be her home, and she is to be cared for and provided with school facilities, she becomes a bona fide resident of the district where she is living, and the person with whom she resides occupies the relation of parent, stands in loco parentis, and may demand for her every right to which his own natural child is entitled.[1]

In line with this liberal construction of the term residence it is usually held that the guardian of a child need not necessarily be one who has legally adopted such child. In Nebraska, a statute provided for the establishment of free schools for all children of the district between the ages of five and twenty-one years whose parents or guardians live within the district. A rule of a board of education qualified the word guardian by inserting, "who have legally adopted them." Under this rule a child who had been taken by a relative to keep and care for as a member of a family was denied admission to the school of the district in which the relatives resided. The court held that such a limitation upon the statute was too narrow and technical and would prevent the attendance of many children who would, as a result, grow up in ignorance.[2]

The fact that "guardian" does not apply alone to legal relations but may apply also to persons standing in loco parentis to a child is further shown in a Maine decision. In this case a child had been committed to the custody of the state board of children's guardians. The board placed the boy in the care of a legal resident of the town of Yarmouth. After attending school in such district for some time he was excluded therefrom on the ground that neither his parents nor his guardians, as required by law, were "legal residents of the school district." The court said in part:

> But the defendants must prevail not withstanding the incongruities involved if the word "guardian" must be held to mean a guardian appointed as such by a court. This, however, is not the necessary meaning. No authority that has been called to our attention so holds.
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> Every dictionary defines "guardian" either precisely or in substance thus: "A person who legally has the care of the person or property or both of another, incompetent to act for himself." This definition applies to Mrs. Whalen. The care

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[1] Mizner v. School Dist. No. 11 of Sherman Co., 2 Neb. 238 96 N.W. 128 (1901).

[2] McNish v. State, 74 Neb. 261, 104 N.W. 186, 12 Ann. Cas. 896 (1905).

> of the realtor was given her by authority of the state. As against his parents, as against all the world, except the state, she is entitled to his custody. By decree of court the rights of the natural guardians have been extinguished. To their rights of care, custody, and protection Mrs. Whalen has succeeded and for the time being possesses and exercises. She stands toward the realtor in loco parentis.[1]

Temporary residence as a basis for school attendance.--While actually living in a school district is usually sufficient to establish residence for school purposes, most jurisdictions will hold that living in a district for the sole or even chief purpose of attending school does not constitute residence as used in the school laws.[2] This ruling is illustrated in an Iowa case. A boy was sent by his father to live with relatives in another district for the purpose of attending the school of the district. The court said in part:

> If a minor leaves the home of his father to reside in another place for the sole purpose of securing free public school education, without bringing with him an actual residence, and with the intent to return to his former residence, he does not become an actual resident within the purview of our school law.[3]

Not only is this true among the school districts of a state but the same rule holds among states. No parent living in one state can send his child into another state for the purpose of attending the schools of that state.[4] A child of school age was sent by her parents to live with an uncle in another state. The uncle was neither her guardian or curator, and she was not apprenticed to him. He had no control over her, only assuming responsibilities in connection with her care while she resided in his family. The girl was denied the right to attend the school in the district in which she lived with her uncle on the ground that she was not a resident of the state for school purposes. In

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[1] Shaw v. Small, 125 A. 496, 124 Me. 36 (1924).

[2] School District No. 1 v. Bragdon, 23 N.H. 507 (1851). Wheeler v. Burrow, 18 Ind. 14 (1862). State v. Superior School District, 55 Nebr. 317, 75 N.W. 855 (1898). School District No. 1, Niobrara Co. v. School District No. 12, Niobrara Co., 18 P. (2d) 1010, 45 Wyo. 365 (1933). Smith v. Binford, 44 Idaho 244, 256 P. 366 (1927).

[3] Mt. Hope School District v. Hendrickson, 197 N.W. 47, 197 Iowa 191 (1924).

[4] Wheeler v. Burrow, 18 Ind. 14 (1862). Haverhill v. Gales, 103 Mass. 104 (1869).

upholding the exclusion the court said:

> Her admission to the free public schools would violate not only the express letter, but also the spirit, of the statute, as it was plainly the purpose of the General Assembly in the enactment of the statute that the benefit accruing from the maintenance of such schools be limited to bona fide residents of the city, on whom the burden for their maintenance is cast.[1]

Attendance of inmates of charitable institutions.--Children living in orphan asylums or other charitable institutions are entitled, in some jurisdictions, so far as residence is concerned, to attend the schools of the districts in which such institutions are located without tuition charge.[2] This is brought about either by a liberal statutory provision or by a liberal construction of the term "residence" by the courts. Of the former type is an Illinois case in which the court of that state, pursuant to a statute which provided that schools should be maintained for all persons in the district over the age of six and under twenty-one years of age, held that children living in a Masonic home were entitled to attend the schools in the district where the home was located. In so holding the court said:

> It is not essential to the right of a child to attend the public schools of the state that it should have a legal domicile in the place in which the school is held. The schools are required to be maintained for all persons in the district over the age of six and under twenty-one years of age. The residence required under this language is not such as would be required to establish a right to vote or which would fix the liability of a township or county for the support of a pauper. The right to attend school is not limited to the place of the legal domicile. A residence, even for a temporary purpose, in a school district is sufficient to entitle children of school age to attend school. A man may leave his home for a temporary purpose, and according as the exigencies of his interests or his business or his public or private employment require or his pleasure dictates, may reside for a longer or shorter time in a different part of the state. He does not thereby lose his legal domicile or his right to vote there at election. Should he become a public charge the town or county of his legal domicile would be liable for his support. His children, however, would not be obliged to attend school in the district of his domicile. The only requirement, so far as residence is concerned, is dwelling in the school

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[1] Winchester Board of Education v. Foster, 116 Ky. 484, 76 S.W. 354 (1903).

[2] Logsdon v. Jones, 311 Ill. 423, 143 N.E. 56 (1924). Ashley v. Board of Education, 275 Ill. 274, 114 N.E. 20 (1916). School District v. Pollard, 55 N.H. 503 (1875). Crain v. Walker, 222 Ky. App. 828, 2 S.W. (2d) 654 (1928).

> district. Every child of school age in the State is entitled to attend the public schools in the district in which it actually resides for the time being, whether that be the place of its legal domicile or the legal domicile of its parent or guardian or not. . . . .[1]

The other type of situation, that of a liberal construction of the term "residence," is well illustrated by a recent Minnesota case. Children living in a private orphans' home were denied the privileges of the school in the district in which the home was located on the ground that they were not residents for school purposes. A statute provided that all public schools should be free to all persons between the ages of five and twenty-one years, in the district in which they resided. In holding that the children were residents for school purposes the court said:

> The legislature must be deemed to have intended to carry out the beneficient purpose of the constitutional mandate and therefore to have used the word 'reside' in its broadest sense and with a view to providing a free education for every child in the state. If the word were used in the strict sense of legal domicile the benefits of free education would, as a practical matter, be denied to children who could not reside at the place of their legal domicile.[2]

The school districts in which such charitable institutions are located may not maintain a school of suitable grade for some or all of the children in its custody. May such children then be transferred to another school district and have their tuition paid by the district in which the institution is located? It has been held that they may.[3]

There are jurisdictions, however, which take an opposite point of view--that residence cannot be gained by being an inmate of a charitable institution.[4] A private charitable institution

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[1] Ashley v. Board of Education, 275 Ill. 274 (1916).

[2] State ex rel. Board of Christian Service of Lutheran Minnesota Conference v. School Board of Consol. School Dist. No. 3, 287 N.W. 625 (1939).

[3] Salem Independent School District v. Kiel, 206 Ia. 967, 221 N.W. 519 (1928). School Tp. 76 of Muscatine County v. Nicholson, 288 N.W. 123 (1939).

[4] Fry v. Upper Swatara Twp. School District, 164 Pa. 603, 30 A. 507 (1894). Parris v. Brooksville School District, 164 Pa. 607, 30 A. 509 (1894). State ex rel. Orphans Asylum v. School District, 10 Ohio St. 448 (1859). Sheldon Poor House Association v. Sheldon, 72 Vt. 126, 47 A. 542 (1900). State v. Eveland, 156 N.E. 169, 117 Ohio St. 59 (1927). Lake Farm v. District Board of School District No. 2, 179 Mich. 171, 141 N.W. 115, 51 L.R.A.

chartered, among other things, for the purpose of providing an education for poor children, cannot escape this responsibility by sending the children committed to its care to the free public schools of the district in which the institution is located.[1] Such was the ruling in a Pennsylvania case where a statute required school directors to establish a sufficient number of public schools for the education of every individual between the ages of six and twenty-one years, in their respective districts. The court said in part:

> . . . . But the presence of the children in these institutions does not, in our opinion confer upon them any additional rights or privileges in the common schools. When the realtor entered the charitable institution of which he is now an inmate he was not entitled to admission to the public schools of Upper Swatara township. He was not a resident of the district, nor a member of any family in it. In view of the purposes for, and the conditions under which he entered it, his presence there did not impose on the local authorities any duty in reference to his education. Neither he nor the institution of which he is an inmate is in any manner identified with the district. The latter pays no taxes there for the support of the schools. It has undertaken to care for, support, and educate him from the fund raised in the manner already stated. While he is in its care and under its control he cannot acquire common school privileges distinct from and independent of those which belonged to him in the place of his residence when he was taken from it. . . . . While it (the school law) establishes schools in which all persons in the commonwealth between the ages of six and twenty-one years may be educated, they must receive the benefits it confers in the districts in which they respectively reside. The residents of one school district are not entitled to free admission to and education in the schools of an adjoining district. The taxes levied by a school district are for the education of the children of that district and are not applicable to the education of the children of another district.[2]

Likewise, an institution chartered and maintained by state funds cannot derive the benefits of the public schools of the district in which the institution is located when the state appropriates sufficient funds for the purpose of educating the inmates thereof.[3]

(N.S.) 234 (1914). State v. Sherman, 104 Ohio St. 317, 135 N.E. 625 (1922).

[1] Fry v. Upper Swatara Twp. School District, 164 Pa. 603, 30 Atl. 507 (1894).

[2] Fry v. Upper Swatara Twp. School District, 164 Pa. 603, 30 A. 507 (1894).

[3] Parris v. Brooksville School District, 164 Pa. 607, 30 A. 509 (1894).

It probably is worth noting that no decision denying school privileges to children living in charitable institutions has been given by a court since 1927. Three favorable decisions all giving a broad construction to the term "residence" have been handed down since that year. These facts, considered with the larger number of jurisdictions which hold that inmates of such institutions are residents for school purposes, leads to the conclusion that, the tendency is for state courts to hold that children living in charitable institutions are residents for school purposes in the district in which such institutions are located. This conclusion is in keeping with the general tendency, so evident throughout the entire chapter, to make the public schools free and open to all children wherever, due to the exigencies of life, they may happen to reside.

Authorities determining residence for school purposes.--Since the statutes usually provide that schools shall be established for all children residing in the several districts of the state, the question arises as to who shall determine whether any given pupil is or is not a resident of a particular district for school purposes. Where a statute requires the board of directors to provide a sufficient number of public schools for the education of every individual of legal school age residing in any school district, it has been held that such directors are equally required to protect those schools from the encroachments of those who are not entitled to admission therein. In holding that the directors should decide who are residents for school purposes the Pennsylvania court reasoned that, "it would greatly impair the government and efficiency of the common schools if the honest judgment and discretion of the board, exercised in good faith, could be reviewed and reversed by a jury."[1]

Similarly, where the local district authorities have the statutory power to prescribe the conditions under which any nonresident pupil may be admitted to the schools of their district, such authorities have the power in the first instance to determine who are and who are not resident pupils for school purposes. The courts will not interfere with the proper exercise of the dis-

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[1] Commonwealth ex rel. Boyd v. School Directors, 211 Pa. 637, 61 A. 247 (1905).

cretion or judgment of any school board acting in good faith in such a quasi judicial capacity.[1]

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[1] Peterson v. School Board of School District No. 1, Cascade Co., 236 P. 670, 73 Mont. 442 (1925).

CHAPTER VIII

ATTENDANCE OF PUPILS IN SCHOOL CORPORATIONS OTHER THAN THOSE OF THEIR RESIDENCE

One of the major problems of American education has been that of providing educational facilities for children in a rapidly increasing population. For many years this problem was complicated by the expansion of the country into unsettled territory. To provide schools for all children many school corporations were formed, most of which have remained, but are not well adapted nor financially able to carry on the program of education which the American people have come to accept as necessary for all children. As one consequence of these movements it has become necessary in providing schools for all children, especially on the secondary level, to make arrangements whereby children may attend school in some district other than that of their residence. Such arrangements have given rise to a considerable body of legislation in the various states and have been the subject of a great deal of litigation in the courts.

Conditions of Transfer as Defined by Statutory Enactment

The attendance of children in public schools is not limited to the schools in the districts where they reside. Almost all of the states have enacted legislation which provides that children, under certain conditions, may attend schools in districts other than the ones in which they have their homes. With very few exceptions the tuition charge for such attendance is not upon the pupils, their parents or guardians, but upon the school corporations in which the children reside. The conditions necessary for such transfer of pupils from the district of residence to another district for school attendance, and the manner in which the transfer is effected constitute a problem for school administrators and are the subjects for analyses in the present discussion.

Transfer of Pupils When District of Residence Provides No School of Suitable Grade

As pointed out above there are many school corporations which are too small or too sparsely populated to maintain a complete system of schools. In order that pupils in such districts may have the privilege of attending school in such a system, most of the states have enacted legislation creating a legal right for pupils to attend school in another district when the district of residence furnishes no school of suitable grade. The authorities responsible for making the transfer and the districts to which pupils may be transferred are indicated in Table 8.

Authorities making transfer.--Pupils who, according to statute, are entitled to attend school in another district when their district of residence provides no school of suitable grade, are transferred by certain designated officials to such districts. Table 8 reveals that the matter of transfer is usually left to local district authorities and that in some instances such authorities must make arrangements with the board of education in the district attended. Very often, however, the transfer is effected by the county superintendent of schools and less often by the board of county commissioners. In a few states the local district or sub-district officials must make transfer arrangements with the county authorities. There are three states in which it is necessary to obtain the consent of the superintendent of schools in the district of residence.

It appears, therefore, that pupils who have the legal right to attend school in another district when their district of residence provides no school of suitable grade, are, as a rule, transferred by the governing authorities of the resident district.

Districts to which pupils may be transferred.--Pupils residing in districts which do not maintain schools of suitable grade have been given the legal right to attend school in a rather wide range of school districts. In general, pupils so situated may attend school in any district of the state. Where such is the case the statute frequently stipulates that only schools approved by the state department may be attended by such pupils if they are to have their tuition paid by the district of residence. In most cases, when the statute allows the pupil to go beyond the borders of the state, it restricts him to an adjoining state and

TABLE 8

PROVISIONS FOR TRANSFER OF PUPILS TO ANOTHER DISTRICT
WHEN DISTRICT OF RESIDENCE FURNISHES
NO SCHOOL OF SUITABLE GRADE

State	Authority Making Transfer	Districts to Which Transfer May Be Made
Arizona.....	Resident Bd.	Any district in county
Arkansas.....	Resident Bd. & Co. Ct.	Dist. in Co. or Adj. Co.
California....	Resident Bd.	Any Dist. in any Co.
Connecticut...	Town school Comm.	School designated by Comm.
Idaho.....	Dist. school trustees	State, Adj. Sch. Adj. state
Illinois.....	Co. Supt.	Any Dist. in state
Indiana.....	Both Dist. authorities	Any Dist. in state
Iowa.....	Dist. Bd.	Any state Dist. or nearer school in Adj. state
Kansas.....	Co. Supt.	Co. nearest residence
Kentucky.....	Resident Bd.	App. H.S. in another Co. or Dist.
Louisiana.....	Supt. of home parish	Adj. parish, or city Dist.
Maine.....	Supt. of resident Dist.	State approved by Ed.Comm'r.
Massachusetts.	Town School Comm.	State appr'd by State Dept.
Michigan.....	Dist. Bd. of Ed.	State appr'd by State Supt.[a] Bordering state, nearest and next nearest appr'd H.S.
Minnesota.....	School Bd.	Adj. Dist. or nearer school in Adj. state
Mississippi...	Both Bds. & Co. Supt.	Adj. Co. or Adj. Dist.
Missouri.....	Dist. attended	Co., Adj. Co. and state institution of higher learning
Nebraska.....	Co. Supt. of Ed.	State appr'd 4-yr. course
New Hampshire.	Resident Bd.	State or another state
New Jersey....	Resident Bd.	Dist. designated by Bd.
New York.....	Bds. of both Dists.	Dist. in state
North Carolina	Co. Bd. of Ed.	Adj. Dists.
North Dakota..	Dist. attended	State, Adj. Dist. Adj. state
Ohio.....	Bds. of both Dists.	Dist. designated by resident Dist. or chosen by pupil
Pennsylvania..	Supt.of resident Dist.	Vocational subjects
Rhode Island..	Town School Comm.	State H.S.
South Carolina	Resident Dist. Trustee	Nearest Dist. Appr'd H.S.
South Dakota..	County Comm'rs.	State or Adj. state
Texas.....	Co. Bd. of Trustees	Home Co. or other Co.
Vermont.....	Resident Directors	Academy in Dist. of residence or nearer Pub.school
Washington....	Resident Directors	State or Adj. Dist. Adj. state
West Virginia.	Resident Bd.	Not stated. (Colored pupils to state supported schools)
Wisconsin.....	District attended	State or another state with school 1 1/2 mi. nearer home of pupil than a Wisc. H.S.
Wyoming.....	Co. Supt.	Another district

[a]High school only

most often to an adjacent district in such adjoining state.

There are only a few states in which the statutes permit the authorities of the district of residence to designate the district in which pupils may attend school when no school of suitable grade is maintained in the resident district. In one of these it is specifically stated that the pupil may select the school if no designation is made by the school authorities.

There is a third group of states which restricts the attendance of pupils to a rather narrow range of schools. In these, attendance is limited to an adjoining district, to any district in the county, or to a school in a district in an adjoining county.

The provisions for the transfer of junior college students are very similar to those for the transfer of other pupils in public schools. In Mississippi, the county superintendent of a county not maintaining an agricultural high school-junior college, may provide, with the approval of the county school board and the board of supervisors, for the attendance of pupils residing in such county, at an agricultural high school-junior college in an adjoining county.[1] The board of education of any school district in the state of Missouri is expressly authorized to set aside from the funds any sum not needed for the support of schools in the district to pay the tuition of high school graduates in such district who attend a junior college in any other school district.[2] The state of Michigan has two different plans for the transfer of junior college students.[3] The board of education in any school district having the power to establish a junior college may contract with the board of education in any school district having a population of five hundred thousand or more, in the same county, and maintaining a junior college, for the attendance thereat of its resident pupils who have completed the work of the regular public high school. But in all other school districts in the state, not maintaining a junior college, transfer of junior college pupils may be made only upon authorization by a majority vote of all qualified electors. The transfer is limited to the nearest

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[1] Mississippi Code of 1930, chap. 163, sec. 6698.

[2] Revised Statutes of Missouri, 1929, Vol. II, sec. 9416.

[3] Mason's 1940 Supplement to Laws of Michigan, 1929, secs. 7572-1, 7572-2.

school district maintaining a legally established junior college. In Minnesota, the conditions of transfer are not stipulated in the statutes. When tuition is to be paid for attending a junior college, it must be paid by either the pupils or the district of their residence.[1] The provisions which control the payment of tuition of high school pupils in Kansas, apply also to the payment of the tuition of junior college students, except in those counties operating under the Barnes High School law, where such students are regarded as residing outside any high school district with their tuition paid by the county.[2]

Considered together, these statutory provisions are unmistakable evidence that pupils are not to be denied educational advantages merely because there is no school of suitable grade in the district in which they reside. Whether it is better to restrict the districts to which pupils may be transferred to those adjoining the district of residence or to permit the selection of any school district in the state is a question. If economic conditions are such that different parts of the state vary greatly in per capita costs, the transfer of a pupil from a poor district to a comparatively wealthy district might work a hardship upon the home district by causing it to curtail its educational programs for the children attending school in the home district. This condition may be one factor in leading a few state legislatures to fix a legal maximum charge against the home district for the tuition of pupils transferred to another district. Whether wise or not, the fact remains that pupils residing in districts where no school of suitable grade is maintained, generally have a right, created by statutory enactment, to attend school in districts selected from a wide area.

Transfer of Pupils When District of Residence Provides a School of Suitable Grade

The transfer of pupils to schools in districts other than those of their residence is not limited to the condition that no school of suitable grade is maintained in their home districts. It may be effected, under certain conditions, even when the dis-

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[1] 1940 Supplement, Minnesota Statutes, 1927, sec. 2992-5.

[2] General Statutes of Kansas, 1935, secs. 3305, 3306.

TABLE 9

CONDITIONS AND MANNER OF EFFECTING TRANSFER WHEN DISTRICT OF RESIDENCE PROVIDES SCHOOL OF SUITABLE GRADE

State	Schools of District		Agent of Transfer		District to Which Transfer May Be Made
	Inconvenient	Remote	Co.	Dist.	
Alabama	...	x	x	x[a]	Exchange of Co. and city
California	...	...	x	x[a]	Inter-Dist., Adj. State Dist., Adj. Dist.in State
Colorado	...	x	...	x[b]	Most accessible in Adj. Co.
Florida	...	...	x	...	Adj. Co. or Adj. State Co.
Georgia	x	x	x	...	...
Idaho	...	x	x	x	...
Illinois	x	...	x	x[c]	Any State Dist., Adj. State
Indiana	x	x[d]	...	x	State Dist., Adj. Dist. in Adj. State
Iowa	...	x	x	x[a]	Same or Adj. Co. or Adj.State
Kansas	x	x	x	x[a]	Adj. Co. in State or Adj. State
Kentucky	x	...	...	x[a]	Another Dist.
Maine	...	x	...	x[a]	Adj. Town
Maryland	...	x	x	...	Adj. Dist.
Michigan	...	x	...	x[b]	Adj. Dist.
Minnesota	...	x[d]	...	x[b]	Adj. Dist.
Mississippi	...	...	x	...	Another Dist.
Missouri	x	...	x	...	Adj. Dist.
Montana	Sufficient reason		x	...	Accredited H.S. in Co. outside Co. of Res. Elem. in Co. or Co. outside State
Nebraska	...	x[d]	x	x	Adj. Dist.
Nevada	x	...	...	x[a]	Inter-Dist.
New Hampshire	x	...	State Bd. of Ed.		...
New Jersey	...	x	x	...	Adj. Dist.
New York	Contract System		...	x[a]	State or Adj. State
Ohio	...	x[d]	...	x[b]	Nearer School
Oregon	...	x	...	x	Adj. Dist. in Adj. State
Pennsylvania	x	x[d]	...	x[e]	More Convenient School in another Dist. or State
Rhode Island	x	...	...	x[a]	Adj. Dist. (Town)
South Carolina	x	...	...	x[a]	...
South Dakota	...	x[d]	...	x	Nearer Sch., State or Adj.
Texas	x	x	x[f]	x[a]	Adj. Dist., Adj. State Dist.
Vermont	x	...	...	...	Adj. Dist.
West Virginia	x[g]	...	x[h]	x	Adj. Co. or Another State
Wisconsin	x	x[d]	...	...	Another nearer Pub. Sch.
Wyoming	...	...	...	x	...

[a] Both districts. [b] District of attendance.
[c] District of residence. [d] Specific distance stated.
[e] If transfer to another state.
[f] Or some uncontrollable and dangerous obstacle.
[g] Not accessible. [h] In Co. H.S.

trict of residence provides a school of suitable grade. As shown by Table 9, there are thirty-four states which have provided by statutory enactment for such transfer.

Conditions of transfer.--There are only two general conditions under which pupils may be transferred when the district of residence provides a school of suitable grade, and they are not clearly distinguishable. The two conditions are "remoteness" and "inconvenience." The former term is used somewhat more frequently than the latter in the statutes and refers to the distance which a pupil lives from the schoolhouse in his home district. To be transferred under the condition of "remoteness" the pupil must live closer to the school in another district than to the school in the district where he resides.

States have defined the conditions of remoteness in different ways. Some, as Maryland, have defined it in general terms by stating that, "children living remote from the school of the district in which they reside may attend school in an adjoining district. . . . ."[1] Other states specify the distance in miles a pupil must live from the school in his home district, and how much nearer he must live to the school in another district before he is entitled to transfer. A Wisconsin statute is an example of such requirements. It provides that, "in case children of school age reside more than two and one-half miles from the school house in the home district, and one-half mile nearer another public school, and transportation is not provided by the home district, such children may attend the nearer school if the facilities for seating and instruction will permit."[2] The distance which pupils must live from the schoolhouse in the district of residence before they can demand the right of transfer ranges from one-and-one-half miles in Ohio[3] to ten miles in South Dakota.[4] A few states, after permitting transfer because of distance, add "or for any other good reason."[5]

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[1] Code of Maryland, Annotated 1924, Vol. II, Art. 77, sec. 116.

[2] Wisconsin Statutes, 1939, sec. 40.21.

[3] Throckmorton's Ohio Code, Annotated, 1936, sec. 7735.

[4] South Dakota Code, 1939, chap. 15.33, sec. 15.3303.

[5] General Laws, State of Idaho 1937, chap. 174, sec. 2. General Statutes of Kansas, Annotated, 1935, sec. 3806.

There are several states which permit transfer to another district whenever it is more convenient for a pupil to attend school in such district than to attend in his home district. The term convenience is more inclusive than the term remoteness and where it is the only condition stated in the statute it doubtless includes remoteness in addition to any other factors which the authorities making the transfer choose to consider.

Most of the states which stipulate convenience as a condition of transfer make no attempt to define the term or to specify what factors it includes. Illustrative of most of the statutes on this point is the Rhode Island statute which provides that, "whenever the school committee of any town shall find that it is more convenient or expedient for any child residing in said town to attend school in an adjoining town, said committee may arrange with the school authorities of such town for the attendance of such child at their schools. . . . ."[1] There is one exception to this rule. After providing that whenever any child, resident in any school corporation in the state, can be better accommodated in the public schools of another corporation, such child may be transferred to that corporation, an Indiana statute specifies that in determining whether a child can be better accommodated, such matters as "proximity of the schools to the residence of the child, the kind and character of the roads to each school, the means of transportation to each, and the crowded conditions of the schools in the two corporations shall be pertinent."[2]

Authorities making transfer.--The authorities which transfer pupils when there is a school of suitable grade are, in general, the same ones which make the transfer when the district of residence provides no school of suitable grade. They are usually the local school authorities. When there is a school of suitable grade in the district, however, it is a more common practice to require the consent of the authorities in both districts and also that of the county superintendent of schools. In some states as shown by Table 9, the county superintendent alone makes the transfer, while in others he acts with one or both boards in the local districts. In some states he makes the transfer when local au-

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[1] Rhode Island General Laws, 1938, sec. 20, p. 414.

[2] Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-3701.

thorities disagree or for some other reason fail to do so. An Iowa statute, which illustrates this type of provision, provides:

> A child residing in one corporation may attend school in another in the same or adjoining county if the two boards so agree. In case no such agreement is made, the county superintendent of the county in which the child resides and the board of such adjoining corporation may consent to such attendance. . . . .[1]

Five other states carry such appeal to the superintendent of public instruction whose decision is final.[2]

Obviously, the transferring authorities in school corporations which provide a school of suitable grade must determine whether any given pupil has met the condition of transfer. This is a relatively simple matter in those states where the statutes specify distances which a pupil must live from the schoolhouses in the two districts to be entitled to transfer. However, in states which make convenience the condition of transfer, the transferring authorities must necessarily use their discretion in making such determination. Most of the statutes making convenience the condition of transfer do not indicate specifically who shall determine when such condition is present. They merely provide that certain authorities may make the transfer when schools in an adjoining district are more convenient. A Florida statute is typical of several. It provides: "When it is more convenient for youth residing in one county to attend school in an adjoining county, they may do so by the concurrence of the superintendents of public instruction of the two counties."[3] Evidently the authorities designated to make the transfer also determine whether the school in the adjoining district is more convenient than the school in the district of his residence, but such discretion is only inferred and is not granted directly.

District to which pupils may be transferred.--Pupils transferring from districts which furnish a school of suitable grade

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[1] Code of Iowa, 1939, sec. 4227.

[2] General Statutes of Kansas, 1935, sec. 3806. 1940 Supplement to Mason's Minnesota Statutes, 1927, chap. 14, sec. 2823. 1937 Cumulated Annotated Supplement to Revised Statutes of Missouri, 1929, Vol. II, sec. 18, p. 1385. Nevada Compiled Laws, 1929, sec. 5938. Public Laws of State of New Hampshire, 1926, chap. 119, sec. 25.

[3] Compiled General Laws of Florida, 1927, Title 5, sec. 511.

do not have as great a variety of districts in which they may attend school as do pupils transferring from districts in which there is no school of suitable grade. The former are almost always limited to the school of an adjoining school corporation in the state of residence or in an adjoining state. As shown in Table 9 there are but few variations from such provision. The most frequent variation is that of permitting pupils to attend school in any school corporation of the state. In two states the district authorities of the two districts may arrange for the inter-district attendance of the pupils in the two districts.

That pupils transferred to another district when the district of residence provides a school of suitable grade should be restricted to adjoining school corporations is to be expected, since they are transferred because it is more convenient for them to attend another school or because the schoolhouse in the resident district is more remote from their home than the schoolhouse in the other district. The significance of such statutes is apparent. No pupil is to be denied the privilege of school attendance merely because the school in his home district is not readily accessible to him.

Transfer When the School in the District of Residence Is Abandoned

Conditions often arise which make the maintenance of a school in a particular district so uneconomical or otherwise disadvantageous that it is better for both taxpayers and pupils to close the school. Accordingly some states have enacted legislation providing for the transfer of pupils to another district when the school in the district of residence is abandoned. The conditions under which a school in any district may be abandoned or suspended, the authority for making the transfer, and the district or districts to which pupils may be transferred are shown in Table 10.

Conditions of abandonment or suspension.--Most of the states which provide by statute for the transfer of pupils to a school in another district when the school in the district of residence is abandoned or suspended make the lack of a sufficient number of pupils the condition necessary to such abandonment or suspension. The number of pupils in such cases is expressed in terms of the enumeration, enrollment, or average daily attendance, and

ranges from an enumeration of less than five pupils to an average daily attendance of less than twenty pupils for any two consecutive months. Typically, the number below which any school may be abandoned or suspended is ten.

TABLE 10

TRANSFER OF PUPILS WHEN SCHOOL IN DISTRICT OF RESIDENCE IS ABANDONED OR SUSPENDED

State	Condition of Abandonment	Authority for Abandoning	District to Which Transfer May Be Made
Connecticut	Sm. enrollment	Bd. of Ed.	Adj. Dist.
Idaho.....	Advantageous Economical	Two-thirds of popular vote	Adj. Dist. in Adj. State
Illinois...	Sm. enumeration	Dist.directors	Neighboring school
Indiana....	...	Majority of legal voters	Another school in same township
Iowa.....	6 Enrollment and 5 A.D.A.	Co. Supt.	Nearer school
Kansas.....	Sm. enrollment	Co. Supt.	Adjoining school
Louisiana..	Sm. Av. attend.	...	...
Maine.....	Low Av. attend.	School Comm.	...
Maryland...	Low Av. attend.	Co.Bd. of Educ.	...
Michigan...	Judgment of Bd.[a]	Vote of people	Another school
Minnesota..	Bd. deems it advisable	School Board	Adjoining or nearby district
Montana....	Bd. deems it advisable	School trustees	Another district
New York...	...	Majority of qualified voters	Another Dist. in state or adjoining state
Ohio.....	Low A.D.A.	Bd. of Ed.	Sch. designated by Bd.
Oklahoma...	Low enumeration	Co. Supt.[b]	Sch. in Adj. Dist.
Oregon.....	...	Majority of legal voters	Adj. or other Dist.
S. Dakota..	...	Sch. Bd.	...
Texas.....	Low enumeration	Co. Supt.	Adj. Dist.
W. Virginia	Low A.D.A.	School Board	Adj. Dist.
Wisconsin..	...	School Board	Another district
Wyoming....	Advantageous Economical	2/3 vote of qualified voters	Adj. Dist. in Adj. state

[a] Applies to high schools only.

[b] Suspended for one year by majority vote of legal voters.

Other states are not so specific in stating the conditions of abandonment or suspension and provide only that the local school board may abandon or suspend the school when in their judgment

they deem it advisable. Two of these states provide that school boards may exercise such authority whenever they consider transfer of pupils to another district more advantageous or economical. These last two conditions are probably the real bases for abandonment and suspension regardless of what specific reasons may be stated in the statutes.

Authority for abandoning or suspending school.--If the school in any district is to be legally abandoned or suspended, the question arises as to who has the authority to effect such abandonment or suspension. In naming those who may exercise such authority, the statutes are rather specific. Table 10 reveals that the authority is most often given to the school boards of the district. This is usually the case where the statutes define specifically the conditions under which the school in any district may be abandoned or suspended. In a few states a school board cannot act until empowered to do so by a favorable vote of the qualified electors of the school district.

Districts to which pupils may be transferred.--Whenever the school in any district is abandoned or suspended, the statutes, as a rule, provide that transfer of pupils shall be to a school in an adjoining or nearby district. Some states provide for transfer to an adjoining district in an adjoining state. In a few states pupils may be transferred to "another district." Where the transfer is limited by statute to a school in an adjoining district, the stipulation is usually made that transportation of part or all the pupils to such school must be provided by the district in which the school has been abandoned. An example of such provision is found in a Minnesota statute which provides that:

> The school board of any district, when it deems it advisable, may provide for the instruction of its pupils in an adjoining district, and in such case may discontinue the schools of its own districts or of any grades or departments in said schools, and provide for the free transportation of the pupils of its own district to the school in an adjoining or nearby district.[1]

The Transfer of a Pupil to Another District When His Parent or Guardian Owns Property in Such District

There is still another condition under which pupils may

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[1] Mason's Minnesota Statutes, 1927, chap. 14, sec. 2822.

attend school in a district other than that of their residence. That is the ownership of property by the parent or guardian in such school district. Seven states have a statutory provision entitling pupils to attend school in a district in which their parents or guardians own property and pay a school tax. Under such condition, in these states, no formal permission from the school authorities is necessary. The pupils are permitted to attend the schools in such district, "the same as resident pupils." Technically, such pupils are neither resident pupils nor transfer pupils. They neither reside in the district nor are they transferred to it.

It must not be assumed, however, that the attendance of these pupils is without restriction. As a rule, there is a restriction in terms of the amount of property owned or the amount of taxes paid. In Minnesota, the only kind of property mentioned in the statute is land, and the parent or guardian must own eighty acres or more if his child or ward is to receive the benefits of the school free of charge. When the amount of land owned is less than eighty acres, the tuition charged the children of the owner is reduced by the amount of taxes paid on such land.[1] Two other states make no mention of the kind or amount of property, stating only that children are entitled to attend the school in any district in which the parent or guardian pays a school tax and to receive credit on the amount charged for tuition to the extent of such tax.[2] Kansas limits the property to land which must lie within an adjoining school district and not in a town or an incorporated city.[3]

Three of the seven states which have enacted legislation entitling children to attend school in a district where their parents or guardians own property or pay taxes in such district, are less restrictive than the ones mentioned above. A South Carolina statute provides that if any taxpayer pays taxes in two or more counties, he shall have the right to send his children to

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[1] Mason's Minnesota Statutes, 1927, chap. 14, sec. 2816.

[2] Compiled Laws of Michigan, 1929, chap. 131, sec. 7156. Laws of Missouri, 1939, sec. 1, pp. 694 f.

[3] General Statutes of Kansas Annotated, 1935, chap. 72, sec. 702.

the school of any one of said counties.[1] After stipulating the population of the county in which such a taxpayer must reside and the population of the municipality in which the property is owned, the state of Alabama provides that the taxpayer, although not residing in such municipality, may send his children to any public school in the municipality upon the same terms, conditions, and charges as if he resided in the corporate limits of such municipality.[2] In North Dakota, no school board may refuse school privileges to or collect tuition from pupils residing in adjacent unorganized territory, if the parents of such pupils are property holders in the district and pay taxes.[3]

Closely related to the right of children to attend school in a district when their parents or guardians own property or pay taxes in such district, is a provision, found in six states, which requires a reduction in the amount of tuition charged such pupils, equal to the amount of school taxes paid in the district by their parents or guardians.[4] That is, children are not entitled to attend school in a district because their parents or guardians pay taxes in the district. However, if they are accepted into the schools of such district, the parents or guardians are entitled to receive credit on the tuition of their children in an amount equal to the school tax paid in that district. Just who is liable for the difference, in case there is one, between the tuition charge and the amount of school tax paid is not specifically stated in five of these states, although the statutes imply that it is the parents or guardians. One state, Vermont, definitely makes the district of residence liable.

Another arrangement for transferring pupils to another district is to transfer, for purposes of taxation, the property of the parents from the district of residence to the district of attendance. In such cases the district of residence must adjoin

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[1] Code of Laws of South Carolina, 1932, sec. 5374.

[2] Alabama School Code, 1927, Art. XLVII, sec. 720.

[3] Compiled Laws of North Dakota, 1913, sec. 1179.

[4] Code of Iowa, 1939, sec. 4269. Baldwin's New York Consolidated Laws, 1938, sec. 567. North Carolina Code, 1935, sec. 5662. Throckmorton's Ohio Code, 1940, sec. 7683. Public Laws of Vermont, 1933, sec. 4246. New Mexico Statutes, 1929, chap. 120, sec. 1202.

the district in which the children attend school, and the parents must petition the proper authorities to make the transfer.[1]

Classification of Statutory Provisions Relating to Transfer

A complete classification of the statutory provisions by which pupils residing in one district may attend the school of another district is shown in Table 11. All classifications with the exception of the one in the last column have been explained above. By general transfer is meant those provisions by which pupils may be transferred from one district to another without stating the conditions necessary for such transfer. Such statutes merely provide that children may be transferred to the school of another district. An Arkansas statute is an example of this type of provision. It provides that the county court shall have power, upon the petition of any person residing in any particular school district, to transfer the children or wards of such person to a district in the same county, or to a district in an adjoining county for school purposes.[2]

It is evident from the facts revealed in Table 11 that the various states, through legislative enactment, are endeavoring to provide educational opportunities for all children, and to provide these opportunities in ways that will encourage children to take advantage of them.

The Attendance of Non-resident Pupils As Affected by Court Decisions

The above analysis of the statutes relating to transfer revealed that every state in the United States attempts, in some form, to create the opportunity, under certain conditions, for pupils residing in a particular district to transfer to another district for the purpose of school attendance. The constitutionality of such statutes as well as the construction of their various provisions in particular situations have been the subject of a considerable amount of litigation in the courts. So varied are

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[1] North Carolina Code, 1935, sec. 5486. 1939 Supplement to Compiled Statutes of Nebraska, 1929, sec. 79-2101.

[2] Digest of Statutes of Arkansas, 1937, Vol. II, chap. 147, sec. 11470.

TABLE 11

CLASSIFICATION OF STATUTORY PROVISIONS BY WHICH PUPILS MAY BE TRANSFERRED FROM THEIR DISTRICT OF RESIDENCE

State	School in District of Residence			Taxes Paid in Another District	Condition Not Defined
	Suitable Grade	No Suitable Grade	Abandoned		
Alabama	x	...	...	x	...
Arizona	...	x	...	...	...
Arkansas	...	x	...	...	x
California	x	x	...	...	...
Colorado	x	x	...	...	...
Connecticut	...	x	...	...	x
Delaware	...	...	...	...	x
Florida	x	...	...	...	x
Georgia	x	...	...	...	...
Idaho	x	x	x	...	x
Illinois	x	x	x	...	x
Indiana	x	x	x	...	x
Iowa	x	x	x	x	...
Kansas	x	x	x	x	...
Kentucky	x	...	...	...	x
Louisiana	...	x	x	...	...
Maine	x	x	x	...	...
Maryland	x	...	x	...	...
Massachusetts	...	x	...	...	x
Michigan	x	x	x	x	...
Minnesota	x	x	x	x	...
Mississippi	x	x	...	...	x
Missouri	x	x	...	x	...
Montana	x	...	x	...	x
Nebraska	x	x	...	...	x
Nevada	x	...	...	...	...
New Hampshire	x	x	...	...	x
New Jersey	x	x	...	...	...
New Mexico	...	...	...	x	x
New York	x	x	x	x	...
N. Carolina	...	x	...	x	...
N. Dakota	...	x	...	x	...
Ohio	x	x	x	x	x
Oklahoma	...	x	x	...	...
Oregon	x	...	x	...	x
Pennsylvania	x	x	...	...	x
Rhode Island	x	x	...	...	...
S. Carolina	x	x	...	x	...
S. Dakota	x	x	x	...	x
Tennessee	...	...	...	...	x
Texas	x	x	x	...	x
Utah	...	...	...	...	x
Vermont	x	x	...	x	...
Virginia	...	...	...	...	x
Washington	...	x	...	...	x
W. Virginia	x	x	x	...	...
Wisconsin	x	x	x	...	...
Wyoming	x	x	x	...	...

these statutes and so numerous are the situations to which they apply, that in many instances the holding of one court furnishes little precedent for that of another. It is uniformly held, however, that the right of any pupil to attend school in any district other than that of his residence is purely statutory. In determining, therefore, whether any given pupil may be transferred, it is necessary, first of all, to refer to the statute in force and then to the judicial construction which may have been given it by the courts.

Validity of Statutes Creating the Right of Transfer

The constitutionality of statutes providing for the transfer of pupils from their district of residence to another district for the purpose of school attendance has been attacked on several different grounds. The most common allegation is that they violate the principle of uniformity in taxation. Such allegation arises where a statute specifies the exact maximum tuition charge which the district of residence must pay for each pupil transferred, or where the per capita cost for non-resident pupils is based on less than the full cost of maintaining the schools attended.

The courts are divided on this question. Some hold that such statutes are valid even though one of the districts may pay a disproportionate share of the cost of maintaining school in the attendance district.[1] The reasoning is usually to the effect that school districts are created and controlled by the state legislature which may make such regulations for providing schools as it may choose so long as the taxes levied for such purposes are uniform and equal within any particular taxing district. An Indiana case illustrates this line of reasoning. A statute in that state provided that children, under certain conditions, were entitled to attend the schools of another district and that the school tax on the property of the parents of such children was to be paid to the

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[1] Edwards v. State, 143 Ind. 84, 42 N.E. 525 (1895). Edmondson v. Board of Education, 108 Tenn. 557, 58 L.R.A. 170 (1902). Boggs v. School Township of Cass, 128 Ia. 15, 102 N.W. 796 (1905). Carey v. Board of Education of City of Belleville, 214 P. 792 (1923). Associated Schools of Independent Dist. No. 63 v. School Dist. No. 83, 142 N.W. 325 (1913). People v. Chicago and N.W. Ry. Co., 286 Ill. 384, 121 N.E. 731 (1918). City of Columbus v. Town of Fountain Prairie, 134 Wis. 593, 115 N.W. 111 (1908).

district in which the children attended school. The school authorities of one district refused to receive pupils on these terms because the amount received for the tuition of pupils was considerably less than the per pupil cost of maintaining their schools. In compelling the authorities to receive the pupils the court reasoned as follows:

> The school system is a State system, established in compliance with the requirements of . . . . the constitution . . . . which makes it the duty of the legislature "to provide for a general and uniform system of common schools, where tuition shall be without charge and equally open to all."
>
> It is not material, therefore, whether or not the school city received as much or more money on account of said transfers from Pike Creek township than the expenses per capita of the pupils transferred from that township. The question of profit or loss has nothing whatever to do with the question, or its determination by the school officers or the courts.[1]

This line of reasoning is further illustrated by an Illinois case. A statute provided that pupils may be transferred from a non-high school district to a high school district and that the non-high school district was to pay the tuition of such pupils, provided, however, the cost of such tuition did not include interest on bonded indebtedness. It was contended that the act discriminated against the taxpayers in the high school district in that they furnished the buildings and equipment while the taxpayers in the non-high school district paid tuition for transferred pupils on the basis of current expenses only. In holding that the act did not violate the principle of uniformity in taxation the court said:

> Each pupil residing in the high school district receives his education on the same terms as all other pupils who reside in such district. Each pupil in the non-high school district is to receive education on the same terms as all pupils in such non-high school district. . . . . The fact that the per capita cost of the pupil residing in the high school district may be more than the per capita cost required of the non-high school district pupil does not violate the rule regarding uniformity in the application of a law to all similarly situated. The pupil within the high school district and the pupil without such district are not similarly situated. The requirement of the Constitution is met when such law applies uniformly to all pupils similarly situated.[2]

There are other cases in which the courts have held that

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[1] Edwards v. State, 143 Ind. 84, 42 N.E. 525 (1895).

[2] People ex rel Goodell v. Chicago and N.W. Ry. Co., 286 Ill. 384, 121 N.E. 731 (1918).

the principle of uniformity is violated unless the district of residence pays as tuition its proportionate share of the cost of educating pupils in the district to which they have been transferred.[1] This line of reasoning is well illustrated in a ruling by the Court of Civil Appeals of the state of Texas. Under the transfer statutes the tuition charge for transferred pupils was to be paid by the district of residence in an amount not to exceed seven dollars and fifty cents per month for each child, and to include only the actual cost of teaching service. All other current and fixed charges were to be excluded. The per capita cost of high-school instruction in the Dallas high schools was between twelve and thirteen dollars. In holding that the statute violated a provision in the state constitution which required uniformity of taxation, the court said:

> We do not think it can be correctly said that the Legislature has the authority to impose taxes on property within an independent school district for the express purpose of furnishing high school facilities and instructional service to students of other districts, and yet that result is precisely what the provisions of this statute would accomplish, if executed. This result can neither be attained directly, nor accomplished indirectly. . . . .[2]

The same principle is applied in a somewhat different situation. Some states fix by statute the amount per pupil which may be paid by the district of residence to the district of attendance. In most states this amount is stated as a maximum, but in a few it is stated as the fixed amount to which any district receiving a transfer pupil is entitled. Obviously, it would be largely a matter of chance if any such amount should be exactly equal to the actual per pupil cost of maintaining school in the district of attendance. It has been contended that where a difference exists between the actual cost and the amount which may be charged according to the statute, one district or the other is discriminated against. A Nebraska case illustrates this situation.

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[1] City of Dallas v. Love, 23 S.W. (2d)(Tex.) 431 (1930). Todd v. Board of Education, 54 N.D. 235, 209 N.W. 369 (1926). Irwin v. Gregory, 86 Ga. 605, 13 S.E. 120 (1891). High School District No. 137 v. Lancaster County, 60 Neb. 147, 49 L.R.A. 343, 82 N.W. 380 (1900). Town of Belle Point v. Pence, 17 S.W. (Ky.) 197 (1891).

[2] City of Dallas v. Love, 23 S.W. (2d)(Tex.) 431 (1930). Affirmed in Love v. City of Dallas, 120 Tex. 351, 40 S.W. (2d) 20 (1931).

In that state a statute provided that any school district should receive the sum of seventy-five cents per week for each nonresident pupil it received into its schools as a result of transfer from another district. Such sum was to be paid by the district in which the pupils had their legal residence. As to whether the legislature could fix the sum at seventy-five cents on the ground that it would cost either less or more and thereby cause an undue burden on one district or the other the court said:

> It is equally clear that, if seventy-five cents a week is a correct estimate of the cost of educating a nonresident pupil at high school, neither the people of the district in which the tax is levied nor the people of the district in which the high school is situated are assessed to pay obligations of another taxing district, and that the rule forbidding the commutation of taxes has not been violated. . . . . On a careful reconsideration of the question, we are unwilling to assume without pleading or proof that tuition at the rate of seventy-five cents a week, as fixed by the present law, will fall below or exceed the expense of educating a nonresident pupil. An enactment of the legislative department of government should not hang in the judicial department by such a slender thread. Legislative acts are presumed to be valid. Burdens imposed by statute are presumed to be reasonable. Courts should never assume that lawmakers will deliberately attempt to spoilate one community for the benefit of another, or pass laws without knowledge of existing conditions. In absence of proof to the contrary, courts ought to assume that the legislature acted with full knowledge of the facts upon which the legislation is based. The burden of proving that a statute contains unlawful or unreasonable terms rests upon those assailing it.[1]

While the court refused to declare the statute unconstitutional, it clearly implied that the district of residence may be charged the full per pupil cost of maintaining school in the district of attendance.

Transfer statutes have also been attacked on the ground that they deprive one district or the other of property without due process of law. The allegation usually arises in cases involving the transfer of pupils when the district of residence provides a school of suitable grade. Under such condition it is contended that the district in which the pupil resides is deprived of property without due process of law by virtue of the fact that revenues raised by taxation in such district are paid out for the support of education in another district without the consent of the taxpayers. Courts, as a rule, do not uphold such conten-

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[1] Wilkinson v. Lord, 85 Neb. 136, 122 N.W. 699, 241 L.R.A. (N.S.) 1104 (1909).

tion.[1] The reasoning of the courts is illustrated in an Illinois case testing the validity of a statute which permitted pupils living in a high school district to attend school in another district when such school was more convenient. The court said:

> The board of education is not created or the taxes levied by it collected for the private benefit of the board, the taxpayer or the pupils residing in the district, but as public funds collected for the purpose of providing a state-wide system of thorough and efficient free schools, and these taxes are public property in the hands of state agents for that purpose, and are subject to the will of the legislature. The act in question therefore did not deprive the school district of its property without due process of law.[2]

Similarly, statutes which provide for the attendance of pupils in schools outside their district of residence have been held not violative of the constitutional provision prohibiting class legislation.[3] Typical of the reasoning of the courts on this point is that in a Wisconsin case. A statute permitted pupils to attend high school in another high school district when they lived more than four miles from the school in their home district and to have their tuition paid by the home district. In holding that the statute was not class legislation the court in part said:

> It is generally held that the legislature, in enacting laws, may resort to classification without violating constitutional provisions when a classification is based upon substantial differences or distinctions between classes, is germane to the purpose of the law, is not based upon existing circumstances only, applies equally to members of a class,

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[1] Union Free High School Dist. of Village of Montfort v. Union Free High School Dist. of Village of Cobb, 216 Wis. 102, 256 N.W. 788 (1934). Board of Education of Princeton High School Dist. 500 v. Board of Education of Wyanet Community High School Dist. No. 510, 314 Ill. 83, 145 N.E. 169 (1924). Proviso Twp. High School No. 209 Board of Education v. Oak Park and River Forest Twp. High School Dist. No. 200 Board of Education, 322 Ill. 217, 153 N.E. 369 (1926).

[2] Board of Education of Princeton High School Dist. No. 500 v. Board of Education of Wyanet Community High School Dist. No. 510, 314 Ill. 83, 145 N.E. 169 (1924).

[3] Associated Schools of Independent Dist. No. 63 of Hector, Renville Co., v. School Dist. No. 83 Renville Co., 142 N.W. (Minn.) 325 (1913). Union Free High School Dist. of Village of Montfort v. Union Free High School Dist. of Village of Cobb, 216 Wis. 102, 256 N.W. 788 (1934). Proviso Twp. High School No. 209 Board of Education v. Oak Park and River Forest Twp. High School Dist. No. 200 Board of Education, 322 Ill. 217, 153 N.E. 369 (1926).

> and the character of one class is so different from another class as reasonably to suggest the necessity or propriety, having regard for the public good, of substantially different legislative treatment.[1]

A statute providing for the transfer of pupils to another school district is unconstitutional if it provides that the district of residence must pay the tuition of transfer pupils only when the parent cannot afford to pay it. This means that public education cannot be extended to different individuals at different prices according to their ability to pay.[2]

Likewise, where a state constitution provides that the legislature establish school districts in which an elected board of directors shall have control of the instruction in their respective districts, a statute which provides that pupils be transferred to another school district when the home district furnishes no school of suitable grade has been held unconstitutional. In so holding the court said:

> Here is a constitutional mandate that instruction in the public schools of every school district shall be under the control of the directors thereof. Nevertheless the General Assembly, by attempted legislation, seeks to divest the directors of districts wherein there is no high school of control of instruction therein beyond a certain attainment, and invest such control in the pupils residing therein, or in the board of directors of an adjoining district. . . . . No discretion is left to the board of directors of the district wherein there is no high school as to the character of high school instruction the pupils thereof shall receive at the cost of the district.[3]

This is an unusual decision and is not followed by other jurisdictions. Under such a ruling a pupil, not living in a high school district, would be denied the privileges of a high school education unless he or his parents paid his tuition. This is not in keeping with modern philosophy or practice.

Authority to Make Transfer

Statutes providing for the transfer of pupils from their home districts to another district for the purpose of school at-

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[1] Union Free High School Dist. of Village of Montfort v. Union Free High School Dist. of Village of Cobb, 216 Wis. 102, 256 N.W. 788 (1934).

[2] People v. Moore, 240 Ill. 408, 88 N.E. 979 (1909).

[3] School District No. 16 v. Union High School District No.1, 60 Colorado 292, 152 P. 1149 (1915).

tendance usually impower certain authorities to effect the transfer. As was revealed in the analysis of the statutes these authorities may be those of the district of residence only, those in the district of attendance only, or both, or the county superintendent of schools. Such authorities are usually given the power by statute to determine whether the conditions for transfer have been met in any particular case. Whether state legislatures can delegate such power to administrative officers and whether the power to transfer is directory or mandatory on such authorities are questions which have been often before the courts.

Power to determine when the conditions of transfer have been met.--Statutes which provide that certain administrative officers have the power to determine when the conditions of transfer have been met have been attacked on the grounds that they are a delegation of legislative power to such officials. Invariably the courts have held that legislatures may delegate such authority to administrative officers as is necessary to carry out the general purposes for which a statute is enacted even though the delegated power confers a discretion upon the officers within the scope of the legislative act.[1] In California, a statute provided that in case the school boards of the district of residence and of the district in which attendance was sought failed to agree on the transfer of pupils, the county superintendent should apportion and cause to be paid to the district of attendance, from the funds of the district of residence, or other unapportioned county funds, whatever amount he thought just. Under this statute, the school board in a district from which pupils were transferred to another district sought to restrain the county superintendent from making the apportionment of the funds of their district on the grounds that such a delegation of power to an administrative officer was unconstitutional. In denying such contention, the court said:

> The preceding sections do not delegate to the superintendent of schools legislative authority. They merely authorize the adoption of reasonable rules, terms and conditions upon which students who reside in the county may be permitted to attend a high school other than the one in which they reside.

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[1] Fillmore Union High School Dist. of Ventura Co., v. Cobb, 53 P. (2d)(Cal.) 349 (1935). Weatherford v. School Directors of Dist. No. 7, 317 Ill. 495, 148 N.E. 244 (1925). Proviso Twp. High School No. 209 Board of Education v. Oak Park and River Forest Twp. High School Dist. No. 200 Board of Education, 322 Ill. 217, 153 N.E. 369 (1926).

> It would be impracticable for the Legislature to attempt to specifically prescribe all the terms and rules under which pupils may be permitted to attend high schools outside the particular district in which they reside since the equity of such terms may depend upon peculiar local conditions.[1]

In other words, it is clearly recognized by the courts that legislatures cannot deal minutely with every particular situation which might arise under any statute. It is, therefore, necessary that the execution of such statutes be left to the "reasonable discretion of administrative officers."

Discretion of authorities to make transfer.--Whether statutes which provide for the transfer of pupils from their home district to another district are permissive or mandatory is a question which frequently arises. In other words, may the school authorities having the power to make the transfer use their own discretion as to whether they shall make the transfer? Much depends upon the wording of the statute, but as a rule, where the district of residence provides no school of suitable grade, the courts will hold that the transfer must be made.[2] It has been held, however, that where a statute specifies that pupils, transferring from a district in which no high school is maintained, must present to the authorities in the district in which attendance is sought, a written statement of permission signed by the school authorities in the home district, no tuition fee can be charged the resident district without such written permission. That is, the board of education in the resident district has the discretionary power to determine to what particular district the pupils under its jurisdiction may be transferred. The reasoning of the court was to the effect that unless such discretion was exercised by the board, many of the pupils might select the most expensive high school available and thus cast an unreasonable financial burden upon a district wholly unable to bear it.[3]

The situation is somewhat different where the statute

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[1] Fillmore Union High School Dist. of Ventura Co., v. Cobb, 53 P. (2d)(Cal.) 349 (1935).

[2] School District No. 2 in Teton Co. v. Jackson-Wilson High School District in Teton Co., 52 P. (2d)(Wyo.) 673 (1936). Brown v. Bailey, 238 Ky. App. 287, 37 S.W. (2d) 58 (1931). School Directors of Dist. No. 3 Clay Co. v. Babcock, 249 Ill. App. 305 (1928).

[3] State ex rel. School Dist. No. 1, Niobrara Co., v. School Dist. No. 12, Niobrara Co., 45 Wyo. 365, 18 P. (2d) 1010 (1933).

provides for transfer of pupils when the district of residence maintains a school of suitable grade. The transferring authorities, as a rule, have more discretionary power than where there is no such school in the district. This is probably due to the fact that such authorities are given, by statute, the duty to determine when the conditions of transfer have been met. Thus, if the statute permits transfer to a more convenient school, the transferring authorities must decide whether such other schools are more convenient. In general, when these authorities have made their decision regarding convenience, it will not be interfered with by the courts except in cases where there is evidence of abuse of discretion.[1]

The attitude of courts toward the discretionary power of school officials is expressed in a Kentucky case. A parent demanded that his children be transferred by the county board of education to a high school in an independent district because the high schools maintained by the county district in which he lived were much less convenient. The county board of education refused to make the transfer. There was no statute in force by which such transfer could be effected for high school pupils. The only condition described in the statute was to the effect that county boards should provide high school education outside the county when there were too few pupils to organize a county high school. It was contended that the county board of education should either provide additional or more convenient high schools in the county district or transfer the pupils to other schools. In upholding the discretion of the county board the court said:

> It may be, as claimed by appellants, that the Caldwell county board of education has failed to administer the affairs of the county economically and efficiently, and that it would be more convenient and, in many instances, for the best interests of the high school pupils to permit them to attend high schools other than those maintained by the county board, and that some of these, or all of them, should be discontinued,

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[1] Lincoln County Board of Education v. Carter, 240 Ky. App. 612, 41 S.W. (2d) 660 (1931). Perkins v. Stephens, 288 Ill. App. 492, 6 N.E. (2d) 237 (1937). Moles v. Daland, 264 N.W. (Ia.) 74 (1935). Stallins v. Caldwell Board of Education, 274 Ky. 824, 120 S.W. (2d) 656 (1938). Board of Education of Drummer Twp. High School Dist. No. 118 v. Board of Education of Sibley Community High School Dist. No. 115, 323 Ill. 152, 153 N.E. 584 (1926). Byers Rural High School Dist. No. 2 v. Board of Commissioners of Stafford Co., 121 Kan. 287, 246 P. 681 (1926).

but that is a matter within the discretion of the board.[1]

Where, however, the statutes which provide for transfer, when there is a school of suitable grade in the district of residence, stipulate the specific distance which pupils must live from the district of residence in order to be transferred, or when they provide that pupils may be transferred to a "nearer" school, the authorities have little discretion in making the transfer. When the conditions specified in the statutes have been met, the performance of the duty by the proper authority is enforceable by mandamus.[2] For example, where a statute specified how much nearer a pupil must live to the school to which he might be transferred than to the school in his home district, an Indiana court held that a pupil must be transferred whenever the statutory conditions were met. In such a case the court pointed out that, "usually the question of whether a particular pupil can be better accommodated by a transfer from his home corporation is left to the discretion of the school officials, but the General Assembly has provided that when certain facts exist, as in the instant case, a pupil can be better accommodated by a transfer, as a matter of law."[3]

Pupils may attend the schools in a district other than that of their residence without the consent of any officials in their resident district and without any formal transfer whatever, if the parents pay the tuition costs. School authorities in the resident district may not prevent such attendance on the ground that the state distributive funds will be reduced thereby. In holding that it was unnecessary for pupils transferring under these conditions to be transferred by the authorities in the resident district, the court said:

> Since the Legislature has conferred upon school districts the power to receive nonresident students upon a fee basis, we can see no reason for attempting to limit the acts of parents who are exercising a discretion vested in them, by virtue of their relation to their children, by denying them the

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[1] Stallins v. Caldwell Co. Board of Education, 274 Ky. 824, 120 S.W. (2d) 656 (1938).

[2] Board of Education of Jefferson Co. v. State, 222 Ala. 70, 131 So. 239 (1930). Pyle v. Puntney, 254 Ill. App. 224 (1929). Carter v. State, 202 Ind. 655, 177 N.E. 449 (1931).

[3] Carter v. State, 202 Ind. 655, 177 N.E. 449 (1931).

> right to send their children to other public schools if they so desire, and especially so where the desired educational facilities are procured at the expense of the parents.[1]

Where a statute provides that the school board make a millage levy to raise revenue for paying tuition of transfer pupils, such levy cannot be in excess of the maximum which can be levied for school purposes in any one year, and the board is not required to transfer any pupil.[2] Neither can any such levy be increased without the consent of the board of education. In so holding the court reasoned:

> The transfer of pupils of one school district to another is an innovation provided by the Legislature which is a convenience to the pupils, and which may properly be classified as a luxury to the school district. It is in no wise necessary for the conduct of the school from which the transfers are made. Being such, it cannot be used to prevent the conduct of the school or to interfere with the right of the school children not transferred to have a school conducted within their school district for their benefit.[3]

However, where a statute empowers school boards to transfer resident pupils to another district, when authorized by a two-thirds majority of the voters voting at any annual or special election, the boards have no choice but to make the transfer.[4]

The statutes providing for the transfer of pupils from their home district to another district usually describe the procedure by which such transfer may be effected. In case this prescribed procedure is not strictly followed by the transferring authorities, it has been held that the statute was merely directory and not mandatory.[5] This does not mean that any school board may use its discretion as to whether it will follow the statutory procedure. It does mean, however, that even where there

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[1] Consolidated School Dist. No. 12 v. Union Graded School Dist. No. 3, 94 P. (2d)(Okla) 549 (1939).

[2] Palmer v. Yale Consolidated Dist., 115 Okl. 70, 241 P. 495 (1925).

[3] School Dist. No. 4 of Garfield Co. v. Independent School Dist. No. 4 1/2 of Garfield Co., 153 Okl. 171, 4 P. (2d) 1031 (1931).

[4] State ex rel. Millsap v. Stoddard, 108 Neb. 712, 189 N.W. 299 (1922).

[5] School Dist. No. 61, Payne Co. v. Consolidated Dist. No. 2, Coyle, Logan Co., 110 Okl. 263, 237 P. 1110 (1925).

is oversight or negligence on the part of the board, the courts will not interfere so long as it can be shown that no injustice resulted from the transfer. It has been held, however, that where a part of the procedure is to have an application for transfer attested by a majority of the board members in the receiving district, the transfer is not legal unless this particular requirement has been met.[1] But where a statute provides that the school authorities in a school district maintaining no high school be notified by pupils that they are transferring to a high school district, such notification is not required where the board already has the information.[2]

Conditions of Transfer

The statutes which provide for the transfer of pupils to another district when the district of residence furnishes a school of suitable grade usually prescribe the conditions which must be met before a transfer can be made. As shown in Table 9, one condition often stated is "inconvenience." That is, a pupil may be transferred to a more convenient school in another district. In the administration of such provisions, disputes have arisen in attempting to determine which is the more convenient school. The courts are in substantial agreement that whether a school is more convenient depends upon different factors and not distance alone, and that it should be determined by the facts in each particular case.[3] The reasoning of the courts which hold to this principle is illustrated in an Illinois case. In holding that "more convenient" includes more than mere distance, the court in part said:

> We think it is also error to construe the words of the statute "more convenient" to mean "nearer to." The ministerial officer aforesaid may find many reasons for correctly de-

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[1] State v. Mc Cartney, 121 Neb. 153, 236 N.W. 339 (1931).

[2] Parker v. Town of Lyndeborough, 79 N.H. 99, 105 A. 7 (N.H.) (1918)

[3] Beck v. Lyon Co. Board of Education, 217 Ky. App. 67, 288 S.W. 1012 (1927). Madison Co. Board of Education v. Smith, 250 Ky. 495, 63 S.W. (2d) 620 (1933). Board of Education of Boyle Co. v. Caldwell, 248 Ky. 751, 59 S.W. (2d) 995 (1933). Reaves v. Sadler, 189 So. (Fla.) 41 (1939). Board of Education of Drummer Twp. High School Dist. No. 118 v. Board of Education of Sibley Community High School Dist. No. 115, 323 Ill. 152, 153 N.E. 584 (1926).

> ciding that a high school is more convenient to a pupil than his own school, although his own high school may be very much nearer to his residence. This might be so because of the character and condition of the roads leading to the respective schools from his home. It might be so in a case where he was so far away from either school as to necessitate his boarding at or near the school he should attend, and by reason of the further fact that he was unable to pay, or have paid, his board, and had a near relative at one school who was ready and willing to furnish him board free of cost in order that he may have the benefit of a high school education, and that he did not have such a relative so accommodating to him in his own school district.[1]

When a statute provides that pupils may be transferred to "nearer" school, the question of whether the distance to each school is to be measured by the most direct route or by the most direct route of public travel. On the basis that it is the intention of the legislature in such legislation to provide for the convenience of children attending school, it has been held that "the distance is to be taken as they travel along the most direct public highway from the school house to the nearest portion of the curtilage of their residence."[2] Where the distance from the residence to each of the schools is practically the same, it has been held that the pupils may be transferred if there is a better school in the district to which they seek to be transferred.[3]

Although the courts are liberal in their construction of the term "more convenient," they will not allow transfer to be made because of personal preferences of pupils under the pretext that it is based on convenience. In Florida, a statute provided for transfer from one school district to another by the county board of education when the school in the district other than that of the residence of the pupils was deemed by the said board to be more convenient. The district of attendance endeavored to collect from the district of residence the tuition costs resulting from the transfer of certain pupils. After declaring that convenience referred to physical barriers and geographical conditions and is not controlled by caprice or preference the court reasoned:

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[1] Board of Education of Drummer Twp. High School Dist. No. 118 v. Board of Education of Sibley Community High School Dist. No. 115, 323 Ill. 152, 153 N.E. 584 (1926).

[2] Eisenhut v. Morrow, 124 Ohio St. 260, 178 N.E. 12 (1931).

[3] Board of Education of Van Buren Co. v. Suggs, 183 Ark. 535, 37 S.W. (2d) 703 (1931).

> When a Special Tax District is created it becomes the duty of the people resident therein, including the Board of Public Instruction, to maintain the integrity of the district and to support its school or schools by attending the one nearest them. It is begging the question to contend that the Board of Public Instruction has the power to cart off to some other district over half the pupils of one district for no other reason than that they prefer the other schools. If this can be done, there is no such thing as preserving the integrity of a Special Tax School District.[1]

Another condition which affects the transfer of pupils from their home district to another district is the ownership of property, either by the pupils themselves or by their parents or guardians, in the district where attendance is sought. There appears to be no case testing either the constitutionality or construction of a statute which creates an unqualified right of transfer under such conditions. In states where the statute requires other conditions along with the ownership of property to be met before a transfer can be made, the courts will not permit transfer until all conditions have been met. In Kansas, for example, a statute provided that a pupil could be transferred to a district in which the parent owned property and in which the school was more convenient by reason of distance than the school in the district of residence. In construing the statute strictly the court said:

> The relative convenience is to be determined by the mere matter of distance--not that of superior roads, or school facilities, or the personality of the teacher, or the relative scholastic or social advantages offered by school district No. 34, nor for any other reason which might prompt the parent to select such adjacent school for his children to attend, rather than the one at home.[2]

However, when all conditions have been met the transfer must be made and credit given to the extent of the tax paid no matter who pays the tuition.[3]

Statutes which provide that when a pupil is transferred to a school in another district for any proper reason, the property of the parent or guardian may be transferred for school-tax purposes to such district, are not invalid on the ground that they are a delegation of power to the board to be used in their discre-

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[1] Reaves v. Sadler, 189 So. (Fla.) 41 (1939).

[2] Richey v. School Dist. No. 52 Cheyenne Co., 128 Kan. 53, 275 P. 1076 (1929).

[3] State v. Bushnell, 95 Ohio St. 203, 116 N.E. 464 (1917).

tion.[1] Such a statute, however, is for the sole purpose of obtaining better school facilities. Hence, under it, the property that becomes transferred for school-tax purposes is transferred as an incident to the transfer of the children, and the property of a person who has no children cannot be transferred from one school district to another, even though there may be children living on such property.[2] Neither may a parent, in the absence of any statutory authority creating the right of transfer on the condition of the ownership of property in another district, compel the board of education of such district to receive his children into the schools of that district free of charge.[3]

To What District Pupils May Be Transferred

Statutes designating the districts to which pupils may be transferred are seldom challenged. Evidently the designations are sufficiently clear to need no further definition by the courts. Although these statutes often restrict the choice of districts to which pupils may be transferred, there appear to be no cases testing the validity of such restrictions. It has been held, however, that parents may not send their children to a parochial school when the school in the resident district has been discontinued and expect to have their tuition paid by such district.[4] A pupil living in a school district where no school is provided may not have his tuition paid in a public high school by his district of residence if there is a private academy in his district which he may attend free of charge.[5] Nor may a pupil have his tuition paid by his district of residence if he, in disregard of a statute, attends a high school which is not recognized as a standard

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[1] Meadows v. Board of Education, 136 Ga. 103, 71 S.E. 146 (1911).

[2] Norton v. Lakeside Special School District, 97 Ark. 71, 133 S.W. 184 (1910).

[3] State v. Joint School District No. 1, 65 Wis. 631, 27 N.W. 829 (1886).

[4] Hlebanja v. Brewe, 58 S.D. 351, 236 N.W. 296 (1931).

[5] Hurlburt v. Inhabitants of Borford, 171 Mass. 501, 50 N.E. 1043 (1898).

school.[1]

Statutes which provide that pupils residing in a district on the state line may attend a more accessible school in the adjoining state are constitutional, and pupils attending school in such district may have their tuition paid by their home district.[2]

Discretion of School Boards to Receive Pupils Transferred from Another District

Even though all the conditions and requirements for transfer of pupils from their home districts have been met, there is still the question of whether the school boards in the district in which these pupils wish to attend school must receive them. While much depends upon the wording of particular statutes, as a rule, school boards have the discretion to accept or reject any pupil seeking a transfer to the schools under their jurisdiction.[3] This principle is illustrated in a Utah case in which the supreme court stated:

> Should a school child desire to attend school in another district, he may do so by the consent of the proper officers of such district. They then can determine whether they have room and other school facilities sufficient to receive additional students and can determine the cost to the district of receiving and caring for such pupils, and so prescribe the conditions upon which such nonresident children will be received.[4]

The older decisions are decidedly more unequivocal in the pronouncement of this principle. The statutes of the various states dealing with transfer at the present time are largely the result of the creation of high school districts and prescribe the

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[1] State v. Alquist, 59 N.D. 762, 231 N.W. 952, 72 A.L.R. 494 (1930).

[2] Pushee v. Lyme School Dist., 76 N.H. 369, 82 A. 718 (1912).

[3] State ex rel. Wright v. Board of Education of City of Cincinnati, 57 Ohio App. 229, 13 N.E. (2d) 371 (1937). McClerkin v. San Mateo School Dist., 4 Cal. (2d) 363, 49 P. (2d) 830, 102 A.L.R. 226 (1935). Logan City School District v. Kowallis, 77 P. (2d) (Utah) 348 (1938). State v. Joint School Dist. No. 1, 65 Wis. 631, 27 N.W. 829 (1886). Chambers v. Everett, 191 Ia. 49, 181 N.W. 867 (1921). Love v. City of Dallas, 120 Tex. 351, 40 S.W. (2d) 20 (1931). Todd v. Board of Education of City of Williston, 54 N.D. 235, 209 N.W. 369 (1926).

[4] Logan City School Dist. v. Kowallis, 77 P. (2d)(Utah) 348 (1938).

conditions under which pupils on the high school level may attend school in a district other than their district of residence. Hence, in later decisions, the courts must give consideration to these statutes. A good example of the older decisions is a Wisconsin case decided in 1886. A parent sought to have his son transferred to an adjoining district free of charge on the grounds that he was a taxpayer in the district. There was no statute providing for transfer on any such basis. A statute did provide that school boards had the power to admit nonresident pupils so long as such pupils did not interfere with the accommodations or instruction of resident pupils. In holding that the school board could not be compelled to receive the boy, the court in a lengthy decision concluded:

> Because it is so absolutely in the discretion of the respondent school-district to refuse the admission of appellant's son to the privileges of its school, the writ of mandamus cannot properly go to compel it to admit him; and it is quite immaterial if the district has refused to admit him on untenable grounds. The absolute power to deny him admission, without assigning any reason therefor, still remains to the district.[1]

In some states, however, boards are restricted by statute in their discretionary power to admit pupils transferred from other districts.[2] For example, a statute provided that a school district unable to furnish accommodations for nonresident pupils without the additional cost for buildings, equipment, teachers, or other reasonable cause, might refuse any or all such non-resident pupils. The statute also fixed the maximum per pupil charge which could be made for transferred pupils. A pupil was refused admission to a school because the actual per pupil cost was higher than the statutory amount. The school district to which transfer was sought admitted that it had facilities for additional pupils, and the evidence showed that the maximum statutory fee was fully compensatory for the additional expense incurred by reason of the attendance of nonresident pupils. After pointing out the above facts, the court held that the board of education in the district had no discretion but to admit the pupils from other districts

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[1] State v. Joint School District No. 1, 65 Wis. 631, 27 N.W. 829 (1886).

[2] State ex rel. Groves v. School Dist. of Omaha, 101 Nebr. 263, 162 N.W. 640 (1917). State ex rel. Baldwin v. Dorsey, 187 N.W. (Neb.) 879 (1922). Carey v. Board of Education of City of Belleville, 214 P. 792 (1923).

seeking admission to their schools.[1]

Taking into consideration the principle as stated in the older decisions and the modifications and restrictions imposed by statutes in later decisions, the rule still is that a school board may, at its discretion, receive transfer pupils into the schools of its district. In the absence of any evidence of fraud or bad faith, this discretion will not be interfered with by the courts.

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[1] State ex rel. Groves v. School Dist. of Omaha, 101 Nebr. 263, 162 N.W. 640 (1917).

CHAPTER IX

FACILITATING SCHOOL ATTENDANCE BY PROVIDING TRANSPORTATION

When schools have been provided and the conditions for admission thereto have been defined, many pupils may be so situated that attendance at any school is impracticable. In recognition of this fact, states have enacted legislation providing conditions which will encourage and facilitate regular school attendance. Since remoteness from any schoolhouse may seriously interfere with the exercise of the privilege of school attendance, many state legislatures have provided for the transportation of children, otherwise qualified, to and from school. The various conditions under which transportation may be provided for any pupil in any school corporation become important factors affecting school attendance.

Statutory Provisions Relating to Transportation of School Pupils

The authority to provide transportation.--There are three general types of statutory provisions authorizing school districts to furnish transportation of pupils. One of these merely authorizes school authorities to provide transportation without stating any conditions whatever. Another type of provision authorizes transportation to be provided by school authorities because of distance. The third type of provision authorizes transportation to be furnished only when pupils live beyond a definitely specified distance from the schoolhouse in the district in which they attend school. Some states provide more than one type of authorization, varying the type from one kind of district to another. That is, in one kind of district the statutory provision may carry no conditions, while in another district the provision may stipulate the number of miles beyond which transportation may be furnished. Likewise, school authorities may be required to provide transportation in some districts, while in other districts they

may use their own discretion.

Statutes which do not state the conditions under which transportation may be provided in any district confer a broad discretionary power upon local school authorities. These authorities determine for whom and under what conditions transportation may be provided. Most of the states with this type of provision grant the authority directly to the school board,[1] but in other states the approval of the county[2] or state authorities[3] must be obtained before the board can act. Typical of the provisions which merely authorize the local school districts to furnish transportation at their own discretion is a Pennsylvania statute which provides that, "the board of school directors in any school district in this Commonwealth may, out of the funds of the district, provide for the free transportation of any pupil to and from the public schools."[4]

The second type of provision, that which stipulates the distance pupils must live from the schoolhouse to be entitled to transportation, is closely related to the type described above. The difference is that the local school corporation is not limited to distance in the first, but may provide transportation for any reason it deems advisable, while in the second it may provide transportation by reason of distance only. Statutes which make distance a condition necessary to providing transportation define such condition in terms of "remoteness" from the schoolhouse or in terms of a distance beyond which it is not reasonable to walk. For example, a New Jersey statute provides that, "whenever in any district there are children living remote from the schoolhouse, the board of education of the district may make rules and con-

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[1] Mason's 1940 Cumulative Supplement to Compiled Laws of Michigan, 1929, chap. 131, sec. 7171 1/2. 1935 Colorado Statutes Annotated, chap. 146, sec. 114. Code of Georgia, 1933, sec. 32-919. Laws of General Assembly of Commonwealth of Pennsylvania, 1937, Act 157, sec. 7. Acts and Resolves of General Assembly of State of Vermont, 1935, sec. 6, p. 110.

[2] School Code of California, 1939, sec. 1.70, p. 781. Alabama School Code, 1927, sec. 100, p. 48. Cumulative Supplement to General Laws of Florida, 1940 Pt., Vol. I, sec. 892(269).

[3] 1937 Supplement to North Carolina Code, 1935, sec. 5780 (114), p. 190.

[4] Laws of General Assembly of Commonwealth of Pennsylvania, 1937, Act 157, sec. 7.

tracts for the transportation of such children to and from school."[1] Two other states have similar provisions.[2] In Kentucky, "any board of education may provide transportation from its general funds or otherwise for any pupil or pupils of any grade or grades who do not live within a reasonable walking distance from the school. . . . ."[3] Florida has an almost identical provision.[4]

The most frequent type of provision authorizing local districts to furnish transportation specifies the distance in miles which pupils must reside from the schoolhouse before the districts have the authority to act.[5] Obviously, this is a limitation upon the discretion of the district authorities. When the distance is specified, however, the local boards, as a rule, are free to act and need not obtain a favorable vote of the electors in order to provide transportation.

The distances specified vary among the different kinds or classes of school districts within any one state. In Iowa, for example, one statute provides that boards in consolidated districts "shall provide suitable transportation to and from school for every child of school age living within said corporation and more than a mile from such school,"[6] while another statute provides that boards must transport pupils enrolled in elementary schools, other than consolidated schools, when such pupils live two-and-one-half

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[1] Revised Statutes of New Jersey, 1937, sec. 18:14-8, t. 18.

[2] Baldwin's New York Laws Service, Supplementing Baldwin's Consolidated Laws, 1939, Art. 33A, sec. 868(13). Rhode Island General Laws, 1938, sec. 30, p. 415.

[3] Carroll's Kentucky Statutes Annotated, Baldwin's 1936 Revision, sec. 4399-20.

[4] General Acts and Resolutions of Legislature of Florida, 1939, chap. 8, art. 1, sec. 801.

[5] Annotated Code of Tennessee, 1934, chap. 2495, p. 604. Nevada Compiled Laws, 1929, sec. 5951, p. 1694. General Acts and Resolves, Florida, 1939, chap. 8, art. 1, sec. 801. 1938 Cumulative Supplement to General Statutes of Louisiana, sec. 2248. General Laws of Idaho, 1937, chap. 151, sec. 1, p. 247. Mason's Minnesota Statutes, 1927, chap. 14, sec. 2816. Ohio Code Annotated, Baldwin's 1936 Revision, sec. 7731. Oklahoma Session Laws, 1939, Art. 9, chap. 34, sec. 1. Public Laws of New Hampshire, 1926, chap. 117, sec. 6. West Virginia Code, 1937, sec. 1774. Session Laws of State of Washington, 1939, sec. 1, p. 375.

[6] Code of Iowa, 1939, sec. 4179.

miles or more from the school in their district, but may provide transportation for a less distance.[1] The same section provides that boards may furnish transportation for high school pupils within a city of seventy-five thousand or more if they live more than three miles from school.

Likewise, there is a variation in distances specified in similar districts in different states. This is especially true in consolidated districts in which the distances vary from one-half mile in Missouri[2] to two-and-one-half miles in South Dakota.[3] Generally speaking, statutes specify the distance beyond which transportation shall be furnished by the consolidated district,[4] but there are a few statutes which leave the determination of such distance to the discretion of the school authorities.[5]

Much of this variation in the provisions for transportation in various kinds and classes of school districts within any one state is probably due to the creation, from time to time, of new school corporations to meet the demands of a rapidly expanding school population. Coupled with this is the evident purpose of the several state legislatures to make school facilities accessible to as many pupils in any district as possible.

Transportation by parents.--Several of the states which provide for the transportation of pupils will, under certain conditions, reimburse parents when they transport their own children. The conditions under which school boards may make such arrangements vary from state to state. In some states the board may use its

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[1] Code of Iowa, 1939, sec. 4233.4.

[2] Laws of Missouri, 1939, sec. 1, pp. 718 f.

[3] South Dakota Code, 1939, chap. 15.34, sec. 15.3404.

[4] 1935 Colorado Statutes, chap. 146, sec. 70. Indiana Statutes, 1933, Vol. VI, sec. 28-1252. General Statutes of Kansas, 1935, chap. 72, sec. 602. Mason's 1935 Supplement to Compiled Laws of Michigan, 1929, chap. 131, sec. 7195. 1937 Cumulative Supplement to Compiled Statutes of Nebraska, chap. 79, sec. 2408. Laws of Legislative Assembly of North Dakota, 1939, chap. 208, pp. 330 f.

[5] Code of Maryland, 1924, Vol. II, Art. 77, sec. 50. North Carolina Code, 1935, sec. 5489. Purdon's Pennsylvania Statutes, 1936, sec. 1634, p. 1096. Vernon Texas Statutes, 1936, art. 2813, p. 609. Illinois Revised Statutes, 1939, chap. 122, sec. 130(e).

own discretion,[1] while in others pupils must live beyond a certain specified distance from the schoolhouse before the board is permitted to make such arrangements.[2]

Transportation to another district.--Transportation is provided for pupils attending school not only in their home district but very often it is provided for pupils who attend in other districts. As a rule, such transportation is provided when there is no school of suitable grade maintained in the district of residence and is most often provided for pupils attending high school[3] or junior college.[4] Some states provide transportation to other districts for pupils below the high school level when there is no school of suitable grade in the home district, and in a few instances transportation will be provided under such conditions to both elementary and secondary pupils.[5] There are only a few of these states which specify by statute the distance pupils must

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[1]Laws of Twenty-Third General Assembly of North Dakota, chap. 236, p. 358. Ohio Code, Baldwin's Revision, 1936, sec. 7731-4. 1937 Cumulative Supplement to Compiled Statutes of Nebraska, chap. 79, sec. 2408. Laws of Twenty-Sixth General Assembly North Dakota, 1939, chap. 208, pp. 330 f. Acts and Resolves of General Assembly of Vermont, 1935, sec. 6, p. 110. Public Laws of State of New Hampshire, 1926, chap. 117, sec. 6.

[2]General Statutes of Kansas, 1935, chap. 72, art. 6, secs. 601, 602. Compiled Statutes of Nebraska, 1929, chap. 79, sec. 1902. South Dakota Code, 1939, chap. 15.34, secs. 15.3400, 15.3401.

[3]1939 Supplement to General Statutes of Connecticut, Part II, chap. 45, sec. 249e. Revised Code of Montana, 1935, ch. 117, sec. 1262.44. Idaho Code, 1932, sec. 32-619. Illinois Revised Statutes, 1939, chap. 122, sec. 102(5th). Burns' Annotated Indiana Statutes, 1938 Cumulative Pocket Supplement, Vol. VI, sec. 28-3810. 1939 Supplement to General Statutes of Kansas, 1935, chap. 72, art. 6, sec. 72-609. Acts and Resolves, Gen. Assembly of State of Vermont, 1935, sec. 14, p. 112. Wisconsin Statutes, 1939, chap. 40, sec. 40.344. General Laws of Massachusetts, 1932, chap. 132, sec. 6.

[4]Mason's 1940 Supplement to Compiled Laws of Michigan, 1929, chap. 131, sec. 7572. 1940 Supplement to Mason's Minnesota Statutes, 1927, chap. 14, sec. 2992-6. 1938 Supplement to Mississippi Code, 1930, chap. 163, sec. 2446.

[5]1940 Supplement to Mason's Minnesota Statutes, 1927, chap. 14, sec. 2816. 1938 Supplement to Mississippi Code of 1930, chap. 163, secs. 2429, 2437. Throckmorton's Ohio Code, Baldwin's 1936 Revision, sec. 7764. Oregon Code, 1930, sec. 35-921. 1939 Cumulative Supplement, Compiled Statutes of Nebraska, 1929, chap. 79, sec. 2102.

live from the schoolhouse in the district to which they have been assigned before the district of residence is obliged to provide them transportation.[1] Most of the states providing by statute for the transportation of pupils to another school, when the district of residence provides no school of suitable grade, specify detailed conditions under which such transportation will be furnished. Oregon is the only state which provides that transportation of pupils to schools outside the district of residence shall be pursuant to the same authority and upon like conditions as transportation is provided within the resident district.[2] On the junior college level, school boards may use their own discretion in determining whether transportation to another district shall be furnished,[3] or the statute may provide that such boards may not act until authorized by a majority vote of the electors in the school district of which the junior college students are residents.[4]

When pupils are provided transportation to and from school in another school district, the cost is usually borne by the district of residence, which may actually furnish the transportation facilities or contract with the board in the district attended to furnish such facilities. There are a few states, however, which permit the school corporation to which pupils are transported to furnish transportation at the expense of the attendance district.[5]

It is generally known among school administrators that school districts with small enrollments often compete for pupils residing in districts not maintaining high schools. In some states

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[1] Throckmorton's Ohio Code, Baldwin's 1936 Revision, sec. 7764. Illinois Revised Statutes, 1939, chap. 122, sec. 102(5th). Remington's Revised Statutes of Washington, 1931, sec. 4719.

[2] Oregon Code, 1930, sec. 35-921.

[3] 1940 Supplement to Mason's Minnesota Statutes, 1927, chap. 14, sec. 2992-6.

[4] Mason's 1940 Supplement to Compiled Laws of Michigan, 1929, chap. 131, sec. 7572-2. 1938 Supplement to Mississippi Code, 1930, chap. 163, sec. 2446.

[5] Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-3801. General Statutes of Kansas, 1935, chap. 72, sec. 605. Minnesota Statutes, 1927, 1936 Supplement, chap. 14, sec. 2822-1. Revised Codes of Montana, 1935, chap. 117, sec. 1262.44. Wisconsin Statutes, 1939, chap. 40, sec. 40.475.

this has resulted in unfortunate practices which state legislatures have sought to prevent by enacting prohibitory legislation. Thus, in Minnesota the state legislature enacted the following statute:

> School districts may use their transportation equipment for the transportation of nonresident pupils upon permission from the State Board of Education; and no special state aid shall be paid for any nonresident pupil transported or boarded illegally or contrary to the standards established by the State Board of Education. The State Department of Education shall formulate such rules and regulations as may be necessary to the end that there shall be no competition between school districts for the enrollment of students.[1]

Iowa and Nebraska, by similar legislation, have endeavored to prevent such practices.[2]

Statutes which provide for the transportation of pupils to school in another district when the district of residence provides no school of suitable grade are generally stated in permissive form, thus leaving the matter to the discretion of the school authorities in the resident district. The extent to which these authorities actually provide transportation to another district is not within the scope of the present study to discover. However, it is common knowledge that many do not. This condition, coupled with the fact that many states make no such provisions for transportation, raises the question of whether states are doing what they can to facilitate school attendance of children living in school corporations which provide no school of suitable grade. In 1939, the Minnesota legislature enacted a unique provision which should be more effective than the typical statutes in facilitating attendance under such conditions. The statute, in part, is stated as follows:

> To facilitate and control the transportation of non-resident high school pupils, the State Board of Education may divide the state into high school areas, each such area containing at least one classified public high school and such school districts and parts of districts as may conveniently be served by such high school. . . . .[3]

State aid is available for the transportation of pupils under

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[1] 1940 Supplement to Mason's Minnesota Statutes, 1927, chap. 14, sec. 3028(3).

[2] Iowa Code, 1939, sec. 4277. 1937 Supplement to Compiled Statutes of Nebraska, chap. 79, sec. 2135.

[3] 1940 Supplement to Mason's Minnesota Statute, 1927, chap. 14, sec. 2991-2.

these regulations. Some such provision may be the answer to the problem which most states are facing, that of ways and means of making it possible for all children living in school corporations providing no school of suitable grade to attend school.

Closely related to the provision for furnishing transportation for pupils when their district of residence provides no school of suitable grade, is the provision for transportation for all the pupils of a district when the school in such district is discontinued. When the district of residence discontinues its school, the school authorities are very often compelled by statute to provide transportation to another district of all pupils residing in such district regardless of distance or any other condition.[1] For example, the Missouri statute, after stipulating the conditions under which a school may be abandoned provides that the superintendent of public instruction shall "require the board to provide for the transportation of the pupils of such district to other public school or schools. . . . ."[2] In other states, school authorities are not obliged to furnish transportation when the school in the district of residence is abandoned unless the pupils live at least a certain specified distance from the school in the district to which they have been assigned.[3] A Wisconsin statute is typical of such provisions. Whenever the board of any district in that state suspends its school, it "shall provide transportation to and from school for all children residing more than two miles from the nearest school which they may attend. . . . ."[4] The most frequent provision made, however, leaves the matter of furnishing transportation to the discretion of the local

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[1] 1937 Cumulative Supplement to Revised Statutes of Missouri, 1929, sec. 20, p. 1386. Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-2807. Oregon Code, 1930, sec. 35-1125. Baldwin's 1938 Supplement to Carroll's Kentucky Statutes, 1936, chap 113, sec. 4363-5a. Throckmorton's Ohio Code, Baldwin's 1936 Revision, sec. 7730.

[2] 1937 Cumulative Supplement to Revised Statutes of Missouri, 1929, sec. 20, p. 1386.

[3] Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-2804. Laws of General Assembly of Commonwealth of Pennsylvania, 1937, act 157, sec. 8. 1939 Cumulative Supplement to Compiled Statutes of Nebraska, chap. 79, sec. 79-218. Code of Iowa, 1939, chap. 213, sec. 4233.4. Wisconsin Statutes, 1939, sec. 40.34(2).

[4] Wisconsin Statutes, 1939, sec. 40.34.

district authorities.[1] In Montana, for example, a statute provides that school trustees

> . . . . may close their school and send pupils of the district to another district or districts and for such purposes are hereby authorized to expend any moneys belonging to their district for the purpose of paying for the transportation of pupils from their district to such other district or districts. . . . .[2]

Transportation of pupils to another district is not limited, however, to the condition that there is no school of suitable grade, or that the school in the district of residence is abandoned. A few states provide transportation to another district even when there is a school of suitable grade in the district in which the pupils reside.[3] Montana provides transportation to either high school or elementary school pupils who may be regularly transferred to a school in an adjoining county in an adjoining state.[4]

Transportation to private and parochial schools.--Transportation of pupils is not limited in some states to those who attend public schools. Since 1933, twelve states have enacted legislation permitting local school district authorities to transport pupils attending private or parochial schools. Of greater significance is the fact that such legislation was enacted in five of these states in the year 1939. This is an interesting development in light of the many decades of attempting to prevent public funds from aiding in any way any schools other than those publicly created and controlled. Transportation of pupils attending such schools, however, is invariably furnished in conjunction with that

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[1] Cumulative Supplement to General Statutes, Revision of 1930, State of Connecticut, Jan. Session 1931, 33, 35, chap. 54, sec. 338c. Compiled Laws of Michigan, 1929, chap. 131, sec. 7104. Laws of Legislative Assembly of North Dakota, 1939, chap. 212, pp. 342 f. Oklahoma Session Laws, 1939, art. 9, chap. 34, sec. 2. Illinois Revised Statutes, 1939, chap. 122, sec. 129. Annotated General Code of Maryland, 1924, Vol. II, art. 77, sec. 77. Mason's Minnesota Statutes, 1927, chap. 14, sec. 2822. Revised Code of Montana, 1935, chap. 93, sec. 1010. General Statutes of Kansas, 1935, chap. 72, sec. 701, art. 7.

[2] Revised Codes of Montana, 1935, chap. 93, sec. 1010.

[3] Mississippi Code, 1930, chap. 163, sec. 6649. Throckmorton's Ohio Code, 1936, sec. 7749-1.

[4] Revised Code of Montana, 1935, 1939 Pocket Part, Vol. I, chap. 93, sec. 1010.3, and chap. 117, sec. 1262.44-A.

furnished to pupils attending regular public schools. No new routes may be laid out, and in some states the pupils are transported to a point on the route laid out for public school transportation nearest the private or parochial school.[1] Other states merely provide that the furnishing of transportation for pupils attending public schools shall include transportation of pupils to private or parochial schools,[2] although some of these states provide specifically that transportation may be furnished when such private or parochial schools are along or near the transportation route laid out by local district authorities for the transportation of pupils to public schools.[3] One state will furnish transportation if pupils live more than three miles from a private or parochial school.[4]

Whether local district authorities may use their own discretion in furnishing such transportation, or whether they may be compelled to do so is, of course, difficult to determine from the wording of the statutes. Some statutes provide that the authorities "may" furnish transportation,[5] while most of them provide that they "shall" furnish it,[6] or that the pupils attending private and parochial schools are entitled equally to the same rights, benefits, and privileges as to transportation as are provided by the public school district for pupils attending public schools.[7]

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[1] Illinois Revised Statutes, 1939, chap. 122, sec. 128(a). Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-2805. Mason's 1940 Supplement to Compiled Laws of Michigan, 1929, chap. 131, sec. 7439. 1937 Supplement to General Statutes of Kansas, chap. 72, art. 6, sec. 606. Laws of State of Maryland, 1937, chap. 185, sec. 1, pp. 321 f.

[2] Laws of Missouri, 60th General Assembly, 1939, sec. 1, pp. 718 f. Laws of State of New Hampshire, January Session, 1937, chap. 199, sec. 1. Baldwin's New York Laws, Supplement, 1937, art. 7, sec. 206.

[3] Oklahoma Session Laws, 1939, chap. 34, art. 11, sec. 1. Oregon Laws, 1939, chap. 352, p. 657.

[4] Supplement to Compiled General Laws of Florida, 1938 Cumulative Pocket Part, Title 6, chap. 4, art. 1, sec. 1296(5).

[5] Mason's 1940 Supplement to Compiled Laws of Michigan, 1929, chap. 131, sec. 7439.

[6] Laws of Missouri, 60th General Assembly, 1939, sec. 1, pp. 718 f. Illinois Revised Statutes, 1939, chap. 122, sec. 128(a). Annotated Indiana Statutes, 1933, Vol. VI, sec. 28-2805.

[7] 1937 Supplement to General Statutes of Kansas, chap. 72,

This latter provision may be reasonably interpreted as mandatory on public school authorities.

The establishment of transportation routes.--Transportation routes affect school attendance only in so far as pupils may be required to walk to them in order to be transported to school. There are two types of statutory provisions for the establishment of transportation routes. One of these is very general and merely provides that certain designated authorities may establish the routes necessary for furnishing transportation to all pupils who are entitled to transportation by the statutes in force in the state.[1] Typical of this type of provision is a South Carolina statute which provides that, "the county board of education of the respective counties of South Carolina shall designate official routes for the transportation of pupils to and from public schools in said counties which routes shall be approved by state department of education."[2]

The other type of statutory provision concerning the establishment of transportation routes specifies the maximum distance pupils may be required to walk to reach the vehicle of transportation on the regularly established route.[3] For example, a New Hampshire statute provides that, "pupils entitled to transportation may be required to walk a distance not exceeding one and one-half miles to an established transportation line or a school bus

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art. 6, sec. 606. Laws of State of New Hampshire, January Session, 1937, chap. 199, sec. 1. Oklahoma Session Laws, 1939, chap. 34, sec. 11. Oregon Laws, 1939, chap. 352, p. 657. Acts and Resolves of Massachusetts, 1936, chap. 390, p. 474.

[1] 1934 Supplement to Code of Laws of South Carolina, 1932, sec. 5474. Revised Statutes of Washington, 1938 Annual Pocket Part, sec. 4719, p. 48. 1935 Colorado Statutes, chap. 146, sec. 114. Supplement to Compiled General Laws of Florida, 1940 Part, Vol. I, sec. 892(86)(10). Code of Iowa, 1939, sec. 4180. 1938 Supplement to New Mexico Statutes, 1929, sec. 120-2502. Supplement to Compiled General Laws of Florida, 1940 Part, Vol. I, sec. 892(269). Wyoming Revised Statutes, 1931, sec. 99-822.

[2] 1934 Supplement to Code of Laws of South Carolina, 1932, sec. 5474.

[3] 1938 Supplement to Mississippi Code, 1930, chap. 163, sec. 2433. Oklahoma Statutes, Harlow's Supplement, 1931, sec. 7056q. Laws of State of New Hampshire, Jan. Session, 1933, chap. 76, sec. 1, p. 96. 1937 Supplement to North Carolina Code, 1935, sec. 5780, p. 190. Ohio Code, Baldwin's 1936 Revision, sec. 7731, p. 657. 1938 Supplement to Mississippi Code, 1930, sec. 2428.

line . . . . or of one mile to other transportation."[1] The distance pupils are required to walk to an established transportation route varies from one-and-one-half miles in New Hampshire to one-half mile in Ohio.[2] Pupils living in out-of-way places[3] or at an unreasonable distance[4] from school may be transported, by their parents, at the expense of the district, to the regularly established transportation route.

Court Decisions Relating to Transportation of School Pupils

So many and varied are the statutory provisions for furnishing transportation to school pupils that many cases involving the interpretation of such statutes have been before the courts. There is a high degree of uniformity among the holdings of the courts of the several states on similar issues which have arisen in the construction of statutes providing transportation.

Constitutionality of statutes providing for transportation.--There are only a few cases testing the validity of statutes which provide for the transportation of school pupils, but such statutes have been attacked on several different grounds. Where a statute provided that the school district should compensate any parent for transporting his children to school, if they resided three miles or more from the schoolhouse, the court held that the statute was not invalid on the grounds that it diverted money collected by taxation to private and individual use. In so holding the court reasoned:

> . . . . If it could be said that the sole purpose of education at public expense is to impose a benefit on the person receiving it and those related to him, the argument of counsel would have some foundation on which to rest. A wider view, however, must be taken of the subject. The common schools of the county, supported by an annual expenditure of millions of money raised by taxation, are not maintained solely to confer advantages on those to whom instruction is imparted, but in the interest of all classes and conditions of the people. . . . . The influence of free schools on the destinies of a free

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[1] Laws of State of New Hampshire, Jan. Session, 1933, chap. 76, sec. 1, p. 96.

[2] Ohio Code, Baldwin's 1936 Revision, sec. 7731, p. 657.

[3] General Statutes of Kansas, 1935, chap. 72, art. 36, sec. 3602.

[4] Code of Iowa, 1939, sec. 4181.

> people is beyond calculation or measurement. The possessor of a liberal education cannot so far confine his knowledge to selfish purposes that the benefits of his learning will not in some degree inure to the good of others.[1]

Funds used in the transportation of pupils, it has been said, are used to pay the necessary and proper expenses in the general operation of the school system in the state. Such use, then, is not a diversion of funds for individual gain.[2]

The validity of transportation statutes has also been attacked on the grounds that they are violative of the constitutional requirement that the legislature establish a uniform system of free common schools. The specific allegation is that the principle of uniformity is violated by reason of the fact that transportation is provided to some pupils living in the district and denied to others.[3] A statute which provided that if two or more districts effected a consolidation, the board of trustees of the consolidated district, together with the county superintendent of schools were authorized and empowered to provide means for the transportation of pupils living two miles from the consolidated schoolhouse. Such provision, it was contended, was violative of the constitutional requirement for a uniform system of schools. In denying the contention the court defined uniformity in the following terms:

> Uniform means equable, applying alike to all within a class. . . . . The requirement of uniformity is met when a law or system operates uniformly on all those coming under its provisions. . . . . Laws are uniform when they "bear equally, in their burdens and benefits, upon persons standing in the same category."[4]

On this same principle a statute was attacked which provided that whenever, by reason of consolidation, a sufficient number of children was situated too far from school to attend without transportation, the board of education was empowered to make provision for transportation and to pay for the same out of the school funds of

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[1] School Dist. No. 3 of Atchison Co., v. Atzenweiler, 67 Kan. 609, 73 P. 927 (1903).

[2] Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458, 50 L.R.A. (N.S.) 428 (1913).

[3] Pasadena City High School Dist. of Los Angeles Co. v. Upjohn, 206 Cal. 775, 276 P. 341, 63 A.L.R. 408 (1929).

[4] Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458, 50 L.R.A. (N.S.) 428 (1913).

the county. It was contended that such a statute conferred special rights, privileges, and immunities on some and withheld them from others. In rejecting the contention the court pointed out the impossibility of conferring absolute uniformity of benefits on all patrons in providing educational facilities, and that any member of a community may be able to bring himself within the provision of the law.[1]

All statutes which provide for the transportation of pupils confer certain discretionary powers upon school authorities in local school corporations. Such provisions have been attacked on the grounds that state legislatures cannot delegate discretionary power to purely administrative officers. This is an old allegation, but it arises anew each time legislation is passed which in any way appears to extend the power of such officers. It has been uniformly held, however, that county superintendents and local district authorities must necessarily exercise discretion in the administration of statutes providing transportation of pupils to and from school, and that statutes conferring such discretion are not unconstitutional.[2] Likewise, a statute which provides for an appeal by parents to the state board of education from the arrangements for transportation made by local boards is not invalid by reason of granting discretionary power to administrative boards.[3]

These few cases testing the validity of statutes which provide for the transportation of pupils to and from school offer unmistakable evidence that state legislatures may not only create districts and provide schools but may also encourage and facilitate attendance thereat by providing transportation of pupils at public expense.

Transportation of pupils in the absence of express statutory authority.--The question has arisen as to whether school authorities may provide for the transportation of pupils when there is no statute which specifically authorizes them to do so. School

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[1] Cross v. Fisher, 132 Tenn. 31, 177 S.W. 43, Ann. Cas. 1916E 1092 (1915).

[2] Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458, 50 I.R.A. (N.S.) 428 (1913). Cross v. Fisher, 132 Tenn. 31, 177 S.W. 43, Ann. Cas. 1916E 1092 (1915). Seiler v. Gelhar, 54 N.D. 245, 209 N.W. 376 (1926).

[3] Nelson v. State, 168 Ind. 491, 81 N.E. 486 (1907).

authorities having no express authority have attempted to provide transportation under the general power granted them to do all things needful and necessary for the maintenance and success of the schools of the district and for the promotion of thorough education for all the children of the district. Providing transportation involves the expenditure of money raised by public taxation. The question of whether school authorities may provide transportation resolves itself into the question of whether these authorities have the power to levy and collect taxes for any purpose not expressly or impliedly authorized either by the constitution or the statutes of the state. Some local school officials have contended that such power is implied in statutes which provide that these officials are responsible for the promotion of the education of all pupils in the district.

As a rule, courts do not grant this contention but hold that the power to provide transportation of pupils is limited to express statutory authority to use school funds for such purpose.[1] This was the ruling in a case where a statute authorized school authorities to levy a special tax for certain designated purposes and "for the payment of other necessary expenses of the schools," and in which it was shown that some children lived so far from the school, over four miles, that unless transportation were furnished they would be transferred to another school corporation.[2] This rule was well stated in an Iowa case in which the court held:

> The duty of school boards to provide transportation for children of school age to and from school is purely statutory and, of course, is limited by the terms of the statute. In the absence of statute, no such duty would exist.[3]

While the weight of authority is against providing transportation of pupils unless there is an express grant of statutory power, there is one jurisdiction which has taken an opposite point of view. The case arose under conditions that were somewhat unique, that of providing for the transportation of colored chil-

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[1] Hendrick v. Morris, 127 Ark. 222, 191 S.W. 949 (1918). Nelson v. State, 168 Ind. 491, 81 N.E. 486 (1907). Shanklin v. Boyd, 146 Ky. 460, 142 S.W. 1041 (1912). Township School Dist. v. Elliott, 276 Mich. 575, 268 N.W. 744 (1936). State v. Jackson, 168 Ind. 384, 81 N.E. 62 (1907).

[2] Nelson v. State, 168 Ind. 491, 81 N.E. 486 (1907).

[3] Rieks v. Independent School District of Danbury, 219 Ia. 101, 257 N.W. 546 (1934).

dren. There was no statute expressly authorizing the school board to provide transportation for any children for any reason. There was a statute authorizing the establishment of separate schools for white and colored children. It was under this statute the court ruled that the board of education had the implied power to provide transportation for colored children, after it had been shown that due to the widely scattered negro population, additional school buildings would need to be constructed for colored children unless transportation were furnished them. In so holding the court reasoned:

> Since the statute grants the board of education specific power to maintain separate schools, we hold that, in order to maintain these schools in an efficient, economical, and businesslike manner, it necessarily follows that the board of education has implied power to furnish transportation for the colored children who live in places remote from the locations of the various schools maintained for them.[1]

Thus, although the weight of authority is against it, there is some precedent for boards of education providing transportation under the general grant of power to promote education in their respective districts.

Transportation to school in adjoining district.--As was pointed out above in the analysis of the statutes, several states provide by statute for the transportation of pupils to the school in an adjoining district. Apparently, the validity of such statutes has seldom been questioned. The only attack on such a statute was the allegation that it delegated legislative power to county superintendents in that such officials could, in their discretion, determine whether a high school pupil could be transported to a school within or without his district of residence. The constitution of the state expressly provided for excepting statutes relating to schools from the restriction that statutes could not go into effect without any other authority than that of the legislature. Thus, the court merely held that since the constitution excepted statutes relating to public schools from this restriction, the statute which gave the county board of education the authority to determine the advisability of transporting pupils to a high school in another district was valid.[2] The only other case which

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[1] Foster v. Board of Education of City of Topeka, 131 Kan. 160, 289 P. 959 (1930).

[2] Minshall v. State ex rel Merritt, 124 Ohio St. 61, 176 N.E. 888 (1931).

has arisen over the validity of such a statute offers no precedent, since the state constitution expressly provided that school boards could contract with each other for the education and transportation of school children. Thus, any statute authorizing such transportation is valid.[1]

The question of whether, in the absence of specific statutory power, school authorities may provide for the transportation of pupils to other districts has been before the courts in several of the states. It has been held in this connection that when a district is required to provide for the transportation of pupils to the school in the district, it must, if it arranges for a pupil to attend a nearer school in an adjoining district, provide transportation to the school of that district even though such district is in an adjoining county[2] or in an adjoining state.[3] Likewise, where a statute provided that district authorities may, when authorized by a majority vote of the electors, furnish transportation to pupils attending the school of the district, it has been held that such authorities may provide for the transportation of pupils to a school outside of the district, even though no mention is made of any such power in any statute. The court pointed out that such power was not prohibited by the statute in question, and was apparently within its scope and the purpose which induced its passage.[4]

At least one state has taken the opposite point of view and has held that unless there is express statutory authority to transport pupils to a school in another district, the district authorities have no power to provide such transportation. In so holding the court said:

> But it is quite obvious that the legislative purpose was to provide means for the transportation of the children of any particular district to the schools of that district. The act says nothing about transporting the children of one district to the schools of another district. . . . .[5]

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[1] Snipes v. Anderson, 179 Ga. 251, 175 S.E. 650 (1934).

[2] Fitzpatrick v. Johnson, 174 Ga. 746, 163 S.E. 908 (1932).

[3] Dermit v. Sergeant Bluff Consolidated Independent School Dist., 220 Ia. 344, 261 N.W. 636 (1935).

[4] Stoops v. Hale, 91 Colo. 246, 14 P. (2d) 491 (1932).

[5] Board of Directors of Gould Special Dist. v. Holdtoff, 171 Ark. 668, 285 S.W. 357 (1926).

Very often pupils live in school districts which do not furnish transportation for pupils who, for some reason, have been legally transferred to another district. Under such condition, may the district to which the pupils have been transferred provide for the transportation of such pupils? There is no case testing the validity of a statute expressly granting such authority. It has been held, however, that where a statute expressly grants the power to authorities to transport pupils from an adjoining district, they cannot transport pupils from any district that does not adjoin their own, since this would necessitate the use of tax money for a purpose other than that for which the tax was levied and collected.[1] But where pupils, legally transferred to an adjoining consolidated district, place themselves within such district on the regular transportation route, at a distance from the schoolhouse greater than the statutory limit beyond which transportation must be furnished for resident pupils, the school authorities in such district may be compelled to provide transportation for them.[2] It appears, then, that statutes which provide for the transportation of the pupils of one district to school in another district are valid, and that when a district provides transportation for resident pupils attending the school of the district, it must, if it transfers any such pupils to an adjoining district, provide transportation for them to such district.

Discretion of school authorities in providing transportation.--The statutes which have been enacted by state legislatures providing for the transportation of pupils are not always clear as to whether they are permissive or mandatory. It is well established, however, that when statutes specifically "authorize" school boards to furnish transportation or when they provide, under certain conditions, that such authorities may furnish transportation when they "deem it for the best interests of the district," transportation becomes a matter of sound discretion with the school board.[3] This principle is rather strictly adhered to

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[1] State ex rel. Boynton v. Bunton, 141 Kan. 103, 40 P. (2d) 326 (1935).

[2] Wellston Consolidated School Dist. No. 1 v. Matthews, 104 Okla. 185, 230 P. 739 (1924).

[3] Fogg v. Board of Education, 76 N.H. 296, 82 Atl. 173, 38 L.R.A. (N.S.) 1110 (1912). Newcomb v. Rockport, 183 Mass. 74, 66 N.E. 587 (1903). Board of Education v. Atwood, 74 N.J.L. 638, 65

by the courts. For example, transportation was refused to an eight-year-old child living four-and-one-half miles from school. A statute provided that the school board "may" provide transportation of pupils to and from school at the expense of the school district, provided funds for such purposes were available. In refusing to grant a writ of mandamus compelling the school board to transport the boy, the court said:

> The statute merely authorizes the school board to furnish such free transportation. The language of the statute is permissive and imports the exercise of discretion. Statutes conferring on school officers power to furnish free transportation of pupils unless in imperative terms are construed to be permissive and as authorizing a use of discretion.[1]

Although this principle is generally applied, it should not be assumed that the decision of school authorities to furnish or not to furnish transportation will not be reviewed by the courts. In the state of Mississippi, for example, a statute made it the duty of school authorities "to provide transportation when necessary for children in their respective districts who live two miles or more from the school house, and pay for same out of the school funds of the district." Under this statute the trustees of a school district refused to furnish transportation for children who lived between two-and-one-half and ten miles from the school. After reviewing the facts in the case the court ruled:

> . . . . where the authorities have located school buildings so far distant that small children cannot, with safety and without undue exposure, attend school, it is contemplated that the authorities shall furnish transportation. When the facts show that the pupils cannot reach the school building safely and without undue exposure, then the duty exists as a matter of law.[2]

Furthermore, when a statute empowers a school board to furnish transportation for pupils living one mile or more from the schoolhouse in the district, the board may not furnish transportation for pupils living within one mile of such schoolhouse. In

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Atl. 999 (1907). State ex rel. Kilmek v. School Dist. No. 70, Otter Tail Co., 283 N.W. (Minn.) 397 (1939). Douglas v. Board of Education of Johnson Co., 164 Ga. 271, 138 S.E. 226 (1927). Berry v. School Board of Barrington, 95 A. 952 (1915).

[1] State ex rel. Kilmek v. School Dist. No. 70, Otter Tail Co., 283 N.W. (Minn.) 397 (1939)

[2] Gordon v. Wooten, 168 Miss. 717, 152 So. 48 (1934).

so holding the Iowa court held:

> The purpose of the statute here under consideration was to equalize or to compensate the disadvantage thus resulting to the remote taxpayer and to bring him within the benefits of the public enterprise by providing transportation for the children residing in the remote areas. No power is conferred to provide transportation for school children residing within one mile of the schoolhouse. The burden assumed is confined strictly to the transportation "to and from school of children residing more than one mile distant. No discretion is conferred upon the board to expand this delegation of power. The power actually conferred is extraordinary from any point of view. It has been carefully hedged about so as to forbid, rather than to invite, expansion."[1]

And, incidentally, it has been held that boards may not provide transportation to various kinds of academic, social, and athletic affairs outside the school district,[2] and in one other jurisdiction boards may not transport pupils to extra-curricular activities within the district even though these activities may be an integral part of the school.[3]

The principle of holding statutes to be permissive, and thus allowing broad discretion to school authorities, unless they are stated in imperative terms, is applied not only to uphold school authorities in their refusal to provide transportation, but also to uphold these authorities when, in the face of opposition, they make provision for transportation. In other words, when school district authorities are authorized by statute to provide transportation for pupils when they deem it for the best interests of the school, the courts will, as a rule, not interfere with their discretion.[4]

On the other hand, another rule of statutory construction is as well established as the one described above. Whenever a statute provides alternative propositions for the education of the children of any school corporation, the authorities of such school corporation cannot escape their responsibility by refusing

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[1] Schmidt v. Blair, 203 Ia. 1016, 213 N.W. 593 (1927).

[2] Schmidt v. Blair, 203 Ia. 1016, 213 N.W. 593 (1927).

[3] Beard v. Board of Education of North Summit School Dist., 81 Utah 51, 16 P. (2d) 900 (1933).

[4] McKenzie v. Board of Education of Floyd Co., 158 Ga. 892, 124 S.E. 721 (1924). Keever v. Board of Education of Gwinnett Co., 3 S.E. (2d)(Ga.) 886 (1939).

to exercise their options.[1] This principle has been applied to the construction of statutes relating to transportation in different types of situations. Where a statute provided that a board of education might either pay the tuition of high school pupils living over four miles from the school in their home district, when they attended a nearer school in another district, or furnish transportation to school in district of residence, the board must either pay the tuition or furnish transportation. They cannot escape liability by refusing to exercise option.[2] Likewise, in a case where a statute provided that the legal voters of a district by a majority vote could suspend school, transport all pupils to another district, and pay for such transportation out of the funds of the district, it was held that once the school had been so suspended transportation must be provided. The court took the position that, "the above provisions are mandatory and the school district cannot, by vote or otherwise, avoid the discharge of a duty plainly imposed upon it."[3] And when a statute provides that school directors may, when they think it best, abandon the school in their district and pay the tuition and transportation of pupils to another district, they have no choice but to transport the pupils when the school is abandoned.[4]

It appears to be clearly established that the discretion of school authorities in providing transportation of pupils to and from school depends upon the wording of particular statutes--that where they are given the power to provide or not to provide transportation, the courts will not interfere with the exercise of their discretion; and that where they have an option to provide transportation or to make other arrangements, they may be

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[1] Rysdam v. School Dist. No. 67 of Union Co., 58 P. (2d) 614 (1936). Board of Education of Ridgeville Tp. Rural School Dist. v. Board of Education of Stryker Village School Dist., 126 Ohio St. 575, 186 N.E. 456 (1933). State v. School Dist. No. 73 of Stillwater Co., 76 P. (2d)(Mont.) 330 (1938). Sommers v. Putnam Co. Board of Education, 113 Ohio St. 177, 148 N.E. 682 (1925).

[2] Board of Education of Ridgeville Tp. Rural School Dist. v. Board of Education of Stryker Village School Dist., 126 Ohio St. 575, 186 N.E. 456 (1933).

[3] Rysdam v. School Dist. No. 67 of Union Co., 58 P. (2d) (Oregon) 614 (1936).

[4] Dennis v. Wrigley, 175 Mich. 621, 141 N.W. 605 (1913).

compelled to exercise such option.

Power of school authorities to establish transportation routes.--School districts which undertake to provide transportation of pupils are confronted with the problem of establishing routes over which the conveyances are to travel. Obviously, it would not be practicable in most districts to send the conveyance to the home of each child entitled to transportation. Many statutes provide specifically that certain designated school authorities may lay out the routes to be traveled by each conveyance. When this is done some pupils must either walk to this route or be transported to it. It is out of this situation that cases have arisen testing the power of school authorities to compel pupils to present themselves on the established route if they are to be transported to the school.

While statutes on this point vary among the different states, it is a well established rule of construction, that school authorities may, in their discretion, determine the route any conveyance shall travel, and that pupils entitled to transportation, not living on such route, may be compelled to travel to that route.[1] Under a statute which provided that school authorities could compensate parents, living in remote places to which it was impracticable to send a conveyance, for transporting their children to the laid-out route, a parent refused to transport his children three miles to such route at the rate of forty cents per day for each child. He sought by mandamus to compel the board to transport his three children the total distance. In refusing to grant the writ the court held:

> The board had authority to make the regulation. Whether it was practicable to reach plaintiff's farm was a question for the board to determine. The board's determination of that question was not reviewable by the district court, and is not reviewable by this court, for the purpose of testing the soundness of the board's conclusions from the facts.[2]

Likewise, pupils may be compelled to walk across railroad tracks

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[1] Walters v. State, 212 Wis. 132, 248 N.W. 777 (1933). State v. Miller, 141 N.E. (Ind.) 60 (1923). State v. Mostad, 28 N.D. 244, 148 N.W. 831 (1914). State v. Board of Education, 102 Ohio St. 446, 132 N.E. 16 (1921). Commonwealth v. Benton Tp., 277 Pa. 13, 120 Atl. 661 (1923). Lanphier v. Tracy Consolidated School Dist., 277 N.W. Ia. 740 (1938). Lyle v. State, 172 Ind. 502, 88 N.E. 850 (1917).

[2] Park v. McKinney, 121 Kan. 151, 245 P. 1021 (1926).

to reach the established route, since it was in the board's discretion to determine whether it was better for a few children to walk across the tracks twice each day, or for several pupils to ride across four times each day.[1]

The determination of distance pupils live from schoolhouse.--The statutes in many of the states provide that transportation must be furnished by the district to pupils residing beyond a specified distance from the schoolhouse. The distance in many of the statutes is to be measured along the "nearest traveled highway," or "usually traveled highway," or "practicable traveled road," or the "most direct route." Very often the question arises as to whether such terms include the distances pupils live from regularly established highways, and whether the distances might not be measured by shortcuts through fields or over trails seldom used. The only discoverable rule in such cases is that such statutes must be construed in light of the purpose for which transportation is provided.[2] That purpose is to encourage and facilitate school attendance. In line with this reasoning it has been held that distance from school should be measured from the door of the house to the door of the schoolhouse rather than from the middle of the road in front of the home to the middle of the road in front of the schoolhouse. The statute provided that the distance should be measured along the "usually traveled road." In construing the term the court said:

> Children live in the house which they call their residence, and that may be in the center of a cattle ranch, or pasture, a half mile or more from the public highway, and there is no good reason for not measuring that distance over a private driveway, or private walk, if it is the usually traveled road from the house to the school.[3]

Under the same rule it has been held the statutory term "nearest traveled highway" need not be a "public highway," in a case where the limitations of the latter term would have deprived children, living over one-fourth mile from the highway, the privilege of transportation.[4] But where children live within the statutory

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[1] State v. Miller, 144 N.E. (Ind.) 60 (1923).

[2] Andrews v. School Dist. No. 1 of Town of Knapp, Jackson Co., 183 Wis. 255, 197 N.W. 813 (1924).

[3] Purkepyle v. School Dist. No. 1, 127 Kan. 751, 275 P. 146 (1929).

[4] Pagel v. School Dist. No. 1 of Town of Concord, 184 Wis.

limit beyond which transportation must be furnished, a "practicable traveled road" is one that is conveniently accessible and publicly maintained.[1]

Providing transportation to private or parochial schools.--In recent years several states have enacted legislation making it possible for local boards of public schools to provide transportation for pupils attending private or parochial schools under the same conditions as those under which it is provided for pupils attending public schools. These statutes appear not to have been tested as to their validity. A New York statute of 1936, almost identical with the present 1939 law now in force, was declared unconstitutional by the highest court of the state in 1938.[2] In the same year an amendment was made to that section of the constitution which forbids the use of public money directly or indirectly for the aid or maintenance of any school under denominational control by adding, "but the legislature may provide for the transportation of children to and from any school or institution of learning."[3] Thus, the transportation of pupils to and from parochial schools is expressly provided for in the state of New York by constitutional provision.

The only other case concerned with the transportation of pupils to private or parochial schools arose over the attempt of a school board that had closed a public school according to statute and undertook to transport the pupils to a private school. A statute provided that when the school board closed a school it must transport pupils to another school. The court held that such transportation must be to "a public school and no others."[4]

251, 199 N.W. 67 (1924).

[1] Peterson v. School Dist. No. 68, 124 Neb. 352, 246 N.W. 723 (1933).

[2] Judd v. Board of Education of Union Free School Dist. No. 2, 278 N.Y. 200, 15 N.E. (2d) 576 (1938).

[3] Constitution of the State of New York, Art. XI, sec. 4.

[4] State v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923).

CHAPTER X

PROVIDING AID TO INDIGENT PUPILS AS A MEANS OF MAKING SCHOOL ATTENDANCE POSSIBLE

The attendance of children at public schools may at times be rendered impossible because of the low economic status of their parents or guardians. In such status the parents or guardians very often are not financially able to provide books, clothing, proper food, or medical attention, and may, in some instances, be in such financial circumstances that the services of the children are necessary for their own support or the support of the family. To meet these various situations many states have enacted legislation providing the aid necessary to make school attendance possible. The privilege of school attendance, then, is not permitted to depend upon the economic status of parents or guardians.

Constitutional Provisions for Aiding Indigent Pupils

There is only one state, Virginia, which makes any direct constitutional provision for aiding indigent school children. The constitution of that state specifies that, "provision shall be made to supply children attending the public schools with necessary textbooks in cases where the parent or guardian is unable, by reason of poverty, to furnish them."[1] Evidently, most state legislatures do not derive their authority to furnish aid to indigent school children from such direct constitutional requirement but rely rather upon the general mandate to provide a system of free public schools open to all children of certain ages within the state.

Statutory Provisions for Aiding Indigent Pupils

Many state legislatures, by statutory enactment, have endeavored to make school attendance of indigent pupils possible by

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[1] Constitution of Virginia, Art. IX, sec. 139.

providing appropriate types of aid. In most instances school authorities must pay for such aid out of public school funds, but in some instances their obligation goes no further than to see that the aid is provided by the proper governmental agency or by some charitable or civic organization. Whatever the manner of administration, it is evident that state legislatures do not intend to permit the school attendance of pupils to be contingent upon their economic status.

Kinds of Aid Provided

There are four specific kinds of aid, as revealed in Table 12, which may be provided for indigent school children. As a rule, these statutes provide that such aids may be furnished when pupils are not able to attend the public schools without them. In some statutes there is an indication that school authorities are not limited to these four aids. For example, a Montana statute, after listing books, medical aid, and clothing as specific kinds of relief which may be furnished, adds that the board of trustees may furnish any further relief it may deem necessary.[1]

The most common form of aid provided is textbooks. This is to be expected in light of the fact that textbooks are generally thought to be indispensable to the proper school progress of any child. There is usually no limitation in the provision for furnishing textbooks, but in a few states there are some restrictions which limit the discretion of the school authorities in providing such aid. For example, the annual expenditure for such purpose may be limited to a fixed amount, and such amount may vary among the different types of school corporations.[2]

There are some states which have enacted legislation authorizing the governing boards of school corporations to provide food to indigent school children. More often, however, the school authorities have no other duty than to report all children not able to attend school on account of the lack of necessary food to some relief agency or overseer of the poor for investigation and

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[1] Revised Codes of Montana, 1935, chap. 106, sec. 1140.

[2] Carrol's Kentucky Statutes Annotated, Baldwin's 1936 Revision, sec. 4434-11. New Mexico Statutes Annotated, 1929, chap. 120, sec. 1423. North Carolina Code, 1935, sec. 5753.

TABLE 12

STATUTORY PROVISIONS GRANTING AID TO INDIGENT SCHOOL CHILDREN

State	Kind of Aid				Source of Aid	
	Books	Clothing	Food	Medical	School Funds	Other Funds
Arkansas	x	...	...	...	x	...
California	...	...	x	...	x	...
Colorado	...	x	...	...	x	...
Connecticut	x	...	...	...	x	...
Georgia	x	...	...	...	x	...
Illinois	x	...	...	...	x	...
Indiana	x	x	...	...	...	x
Iowa	x	...	...	...	x	...
Kansas	x	...	...	...	x	...
Kentucky	x	...	...	...	x	...
Louisiana	x	...	...	...	...	x
Massachusetts	...	...	...	x	...	x
Michigan	x	...	...	...	x	...
Minnesota	x	...	...	...	x	...
Mississippi	x	...	...	...	x	...
Missouri	x	...	x[a]	...	x	...
Montana	x	x	...	x	x	...
Nevada	x	...	...	...	x	...
New Jersey	...	x	...	...	x	...
New Mexico	x	...	...	...	x	...
New York	x	x	x	...	x	x
North Carolina	x	...	...	...	x	...
North Dakota	...	...	...	x	x	...
Ohio	x	...	...	x	x	...
Oklahoma	x	...	...	...	x	x
Oregon	x	...	...	...	x	...
Pennsylvania	...	x	x	...	...	x
South Carolina	x	x	x	...	x	x
Tennessee	x	x	x	...	x	x
Utah[b]	x	...	...	...	x	...
Vermont	...	x	x	x	x	...
Virginia	x	x	...	...	x	...
Washington	x	...	...	...	x	...
West Virginia	x	...	...	...	x	...
Wisconsin	x	x	x	...	x	x

[a] In cities of 500,000 or more.

[b] Children in detention school.

relief. Statutes which provide for furnishing food to indigent school children at the expense of the school corporation vary greatly in their specific provisions. In California, the governing boards of all school districts are empowered to establish rules by which meals may be furnished free of charge to pupils who

do not receive proper nourishment.[1] The Missouri statute permits school boards in certain cities to furnish lunches at less than cost to pupils of compulsory school age as would otherwise be unable, by reason of insufficient nutrition, to attend school and to pursue the courses of study prescribed; but this can only be done from any surplus derived from the sale of lunches to other children.[2] School boards may prescribe the price of lunches to needy children in Wisconsin, but the fact that such lunches are furnished to some at less than cost is not to be disclosed to others.[3]

Clothing will also be furnished in a few states out of the funds of the school corporation. As with food and medical aid, the provision for furnishing clothing to indigent school children is usually a part of the compulsory education statutes. Such provisions may either make it the duty of the school board to furnish proper clothing when they have knowledge of the need existing,[4] or they merely provide that parents may not be punished for not sending the children to school unless the local school authorities furnish the children with the clothes necessary for school attendance.[5] Some of the states in which clothing is furnished when necessary to school attendance provide only that the school authorities report the need to some relief agency which is free to act as it deems best,[6] while others provide specifically that upon verification of the need by such agencies, they "shall" furnish the clothing needed.[7] In Indiana, the necessary aid must be provided temporarily by the school corporation which will in turn

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[1] School Code of California, 1939 Supplement, Art. IIa, sec. 1.102, p. 783.

[2] 1937 Cumulative Supplement to Revised Statutes of Missouri, 1929, chap. 57, sec. 9206.

[3] Wisconsin Statutes, 1939, sec. 40.53, pp. 524 f.

[4] Colorado Statutes Annotated, 1935, chap. 146, sec. 276.

[5] The Virginia Code, 1936, sec. 686, p. 183.

[6] Laws of General Assembly of Commonwealth of Pennsylvania, 1937, Act 478, sec. 12, p. 2571. Annotated Code of Tennessee, 1934, sec. 2430, p. 589. Acts and Joint Resolutions of General Assembly of South Carolina, 1937, sec. 7, p. 558.

[7] Public Laws of Vermont, 1933, sec. 4260. Wisconsin Statutes, 1939, sec. 40.171, p. 503.

be reimbursed by the township overseer of the poor.[1] Public welfare officials in the state of New York are given the duty, by statute, to "furnish indigent children with suitable clothing, shoes, books, food and other necessaries to enable them to attend upon instruction . . . . as required by law."[2]

Medical aid may be furnished indigent children in a few states. Some statutes make only a blanket provision for such aid,[3] while others state specifically the kinds of medical aid which is to be furnished. Thus, in Massachusetts, municipalities are authorized to furnish "eyeglasses and spectacles" to needy school children, and in Vermont, boards of school directors may provide glasses, dental service, removal of tonsils, and other health services to school children of indigent parents at the expense of the school district.[4]

In addition to the specific kinds of aid mentioned above, some states will provide whatever aid is necessary to enable a child to attend school when it is shown that his services are required to support himself or a dependent legally entitled to his services. Such aid may be authorized by a blanket provision giving school authorities full discretion in the determination of the amount of aid necessary,[5] or it may be limited by the statute to a specified monthly sum which may be paid to the family of such child.[6] In Oklahoma, any child under sixteen years of age whose wages are necessary for the support of his widowed mother may be granted a "scholarship" for the amount of his wages or such por-

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[1] Burns' Annotated Statutes of Indiana, 1933, Vol. VI, sec. 28-512.

[2] Baldwin's New York Consolidated Laws, 1938, sec. 627, pp. 83 f.

[3] Throckmorton's Ohio Code, Baldwin's 1936 Revision, sec. 7777. Revised Codes of Montana, 1935, chap. 93, sec. 1015. Supplement to 1913 Compiled Laws of North Dakota, 1913-1925, sec. 1346. Purdon's Pennsylvania Statutes, 1936, Tit. 24, sec. 1431.

[4] Acts and Resolves, General Court of Massachusetts, 1937, chap. 185, p. 163. Acts and Resolves of General Assembly of State of Vermont, 1935, sec. 1, p. 114.

[5] Throckmorton's Ohio Code, Baldwin's 1936 Revision, sec. 7777. Mason's Minnesota Statutes, 1927, chap. 14, sec. 3090.

[6] Compiled Laws of Michigan, 1929, chap. 131, secs. 7428, 7429. North Carolina Code, 1935, sec. 5763.

tion thereof as is necessary for the support of his mother for such time as the child is required to attend school.[1] Such direct general aid, whether in the form of personal necessities or in the form of money, is provided from the same funds as are the current expenses for the maintenance of public schools in some states,[2] while in others it is provided from the public funds of the county.[3] But from whatever source any type of aid is provided to indigent children that their attendance at school may be made possible, there is unmistakable evidence, in the statutes mentioned above, that many state legislatures will not permit indigency to prevent the attendance of children upon the public schools.

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[1] Oklahoma Statutes, 1931, sec. 7005.

[2] Compiled Laws of Michigan, 1929, chap. 131, sec. 7429. North Carolina Code, 1935, sec. 5763. Throckmorton's Ohio Code, Baldwin's 1936 Revision, sec. 7777.

[3] Oklahoma Statutes, 1931, sec. 7005. Mason's Minnesota Statutes, 1927, sec. 3090.

CHAPTER XI

THE PAYMENT OF TUITION AND INCIDENTAL FEES

That pupils residing in a public school district maintaining a school system comprising the first twelve grades or less may attend such school free of tuition charge, is well established through the constitutional provisions, legislative enactments, and court decisions of the several states. The question arises, however, as to whether incidental and matriculation fees may be collected from pupils as a condition precedent to school attendance in schools supported by public taxation. And when school districts offer a junior college course, may resident pupils otherwise eligible, be compelled to pay a tuition charge for the privilege of attending such college?

Statutory Provisions

The payment of matriculation and incidental fees.--Very few states have enacted legislation authorizing local school authorities to collect matriculation and incidental fees as a condition precedent to school attendance. In Alabama a matriculation fee may be collected for each semester from all pupils in accredited high schools, to be used as the boards of education may direct, and in addition a reasonable fee for library, laboratory, and shop work may be required.[1] School trustees in South Carolina may "charge and collect matriculation and incidental fees from pupils when allowed by any special Act of the General Assembly."[2] In Montana, pupils enrolled in the commercial, industrial arts, music, domestic science, scientific, or agricultural courses, may be required by the board of trustees to pay reasonable fees to cover the actual cost of breakage and of excessive supplies used.[3]

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[1] Alabama School Code, 1927, Art. XXIV, sec. 467.

[2] Code of Laws of South Carolina, 1932, sec. 5834(9).

[3] Revised Codes of Montana, 1935, chap. 117, sec. 1262.84.

Payment of tuition fees in junior college.--It is a well known fact that in recent years many states have, by legislative enactment, empowered school districts to establish junior colleges offering courses extending through two years of work beyond the regular high school. Tuition fees may be imposed by local authorities in some of these states as a condition to attendance at such junior colleges. The statutory provisions authorizing the collection of such tuition fee vary among the different states, some stipulating specifically the maximum rate which those attending may be charged,[1] and others merely authorizing school authorities, at their own discretion, to require a tuition fee in such sum as thought to be necessary for the maintenance of the college.[2] Other states specify either the exact amount[3] or the minimum sum[4] which must be charged resident students.

The maximum tuition fee which local authorities are empowered by statute to collect from each resident student varies from one hundred dollars per annum in Kentucky to one hundred twenty-five dollars in Montana. In all cases where the maximum charge is fixed by statute, school boards may, in their discretion, charge any amount less than the sum stipulated or they may make no charge at all, since such fees are for the purpose of supplementing the funds raised by taxation.

The statutes which merely provide a general authorization for boards of education to collect a tuition fee from pupils attending junior colleges are rather uniform. Typical of many, a

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[1] Baldwin's Kentucky Statutes, 1939, sec. 3219-11, p. 310. Revised Codes of Montana, 1935, 1939, Pocket Part, Vol. I, chap. 120B, sec. 1322.12, p. 158. 1937 Supplement to Compiled Statutes of Nebraska, chap. 79, sec. 2813, p. 600.

[2] General Acts and Resolutions of Legislature of Florida, 1939, sec. 4, pp. 297 ff. Mason's 1940 Supplement to Compiled Laws of Michigan, 1929, sec. 7570, p. 787. 1940 Supplement to Minnesota Statutes, 1927, sec. 2992-5, p. 697. Revised Statutes of Missouri, 1929, sec. 9414, p. 2600. North Dakota Session Laws, 1931, sec. 4, pp. 422 f. Oklahoma Session Laws, 1939, sec. 6, p. 198. 1936 Supplement to South Carolina Code of Laws, 1932, sec. 5696-4, p. 240. Vernon's Texas Statutes, 1936, art. 28151, sec. 4, p. 617. Code of Iowa, 1939, sec. 4273. Vernon's Texas Statutes, 1939 Supplement, art. 2815h-3, sec. 12, p. 497.

[3] General Laws of State of Idaho, 1939, sec. 11, p. 67.

[4] 1939 Supplement to Utah Revised Statutes, 1933, Tit. 75, chap. 6, sec. 4.

North Dakota statute provides, "the Board of Education . . . . shall determine the rate of tuition, if any, required to be paid by all pupils attending such departments, whether residents or not, of the district maintaining the same."[1] Boards of education in Missouri are authorized to collect tuition fees from resident junior college students only when they are over twenty years of age.[2]

There is only one state in which an annual entrance fee may be charged in addition to the regular tuition. This state is Utah which requires an annual entrance fee of ten dollars and a minimum tuition fee in addition of seventeen dollars per quarter of all resident students attending junior college in any junior college district. Provision is made for admitting resident "meritorious or impecunious" students free of charge to a number not exceeding 10 per cent of the total enrollment.[3] Idaho is the only state which has stipulated by statutory enactment the exact tuition fee which each resident student must pay to attend a junior college. The amount is fifty dollars per annum. Students, not residents of the district but of the county in which the junior college district is located, must pay seventy-five dollars per annum, while all other nonresidents must be charged not less than one hundred dollars.[4]

The significance of the facts revealed in the above analysis of the statutes relating to tuition fees in junior colleges is that so few states require any such fee to be paid by resident students as a condition precedent to school attendance. Most of the states which mention fees in their statutes merely authorize local school authorities in school districts maintaining junior colleges to collect fees from resident students in such colleges when, in the judgment of the school board, the amount so collected is necessary for the proper conduct of the junior college department. These facts, coupled with the fact that several states neither require nor authorize the payment of tuition fees, point

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[1] Session Laws of North Dakota, 1931, sec. 4, pp. 422 f.

[2] Revised Statutes of Missouri, 1929, Vol. II, sec. 9414.

[3] 1939 Supplement to Utah Revised Statutes, 1933, Tit. 75, chap. 6, sec. 4.

[4] General Laws of Idaho, 1939, chap. 32, sec. 11, p. 67.

clearly to the conclusion that the junior college department is coming to be generally recognized as an integral part of the public school, open to the youth of the state on the same terms as are the other units of the school system.

Court Decisions

There are comparatively few jurisdictions in which the payment of tuition and fees as a prerequisite to school attendance has been before the courts. The points most often raised in this connection are the validity of statutes authorizing the collection of such fees, the authority of local school boards to demand their payment in the absence of statutory authority, and the use made of the income derived from them.

Validity of statutes authorizing the collection of tuition fees.--On this point the courts are not entirely agreed, but where the constitution of the state requires unequivocally that the legislature establish a system of free public schools, a statute which authorizes school boards to exact the payment of tuition fees as a condition precedent to school attendance is unconstitutional.[1] In Arkansas, for example, a special act of the legislature empowered the board of directors in a certain district to charge a tuition fee when they deemed it necessary. Acting under this authority, the board undertook to charge a tuition fee of all resident pupils above the eighth grade. Such a charge, it was contended, was necessary if the district were to maintain a high school. The constitution of the state provided that all children between the ages of six and twenty-one should be given gratuitous instruction. The court held that the legislature had no power to enact such a law.

> If they did not have sufficient funds, the directors had the authority to limit the common schools to the lower grades; but the Legislature, under our Constitution, could not vest the directors with the power to establish a high school and charge tuition therefor. It could only invest the directors with the power to control and manage the common schools, and could vest them with authority to establish schools of lower grades and also high schools, which might be free to all persons between the ages of six and twenty-one years; but it could not give the directors power to charge tuition either

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[1] Special School District No. 65 v. Bangs, 144 Ark. 34, 221 S.W. 1060 (1920). Irvin v. Gregory, 86 Ga. 605, 13 S.E. 120 (1891).

in the lower grades or the high school to persons who were entitled to tuition free.[1]

An almost identical situation arose in the state of South Carolina where the court made an opposite ruling. The legislature of that state, by a special act, granted a charter to the Rock Hill school district. This charter vested the board of trustees with power "to assess upon scholars, as supplementary tuition fees, such sum or sums as may be necessary to meet the expenses of the school attended by them." Under this authority, the board promulgated the rule that, "all pupils whose names are not on the free list, or whose tuition is not paid within the time specified, shall be denied the privilege of attending school." The constitution provided that, "the General Assembly shall as soon as practicable after the adoption of this Constitution provide for a liberal and uniform system of free public schools throughout the state. . . . ." The court held that the act authorizing the rule of the board was not unconstitutional. The reasoning by the court was to the effect that it was not the intention of the framers of the constitution that any particular section of the constitution relating to schools should be enforced unless all parts had been carried out. For example, since the legislature had not yet established schools in all the territory of the state, the provision that the schools which had been established must be free was not mandatory.[2] And the same court as late as 1924, upheld an identical special provision which authorized a different school district in the state to charge fees.[3]

Statutes authorizing school boards in the state of Alabama to levy a matriculation fee and incidental fees for library, shop work, and laboratory have been held to be constitutional by the supreme court of that state. The constitution provided that the legislature should establish, organize, and maintain a liberal system of public schools for the benefit of the children of the state between seven and twenty-one years. The court made a distinction between a "free" system of schools and a "liberal" sys-

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[1] Special School District No. 65 v. Bangs, 144 Ark. 34, 221 S.W. 1060 (1920).

[2] Holler v. Rock Hill School District, 60 S.C. 41, 38 S.E. 220 (1901).

[3] Felder v. Johnston, 127 S.C. 215, 121 S.E. 54 (1924).

tem of schools.

> It is quite evident that, if the framers of the Constitution had thought to impose upon the Legislature the duty to establish a system of free public schools, they would have used just that word. "Free" and "liberal" are by no means synonymous terms. They are both terms of varied meaning and application. The better part of three columns of Webster's New International Dictionary are devoted to definitions of the word "free"; but as applied to schools, that authority defines a free school as a school where no charge is made for tuition. "Liberal" also is a word of varied meaning. As applied to the public school system we do not doubt that it intends a system as generous and bountiful as a just consideration of the limited power of taxation and the varied needs of the state will in reason justify. Necessarily something must be left to the enlightened discretion of the Legislature which, within constitutional limits, levies taxes and apportions them to the various needs of the state.[1]

Charging of fees in the absence of express statutory authority.--It has been held that, unless there is express statutory authority, no school board may exact a matriculation or incidental fee as a condition precedent to school attendance.[2] Thus, where a school district charged a matriculation fee of three dollars in order to keep a school open the length of time necessary to make it a standard school, the court held that the school was still a public school, and could not, therefore, charge such a fee.[3] Neither may a school board charge a yearly incidental fee under the general statutory authority vested in such board to control the schools of the district.[4] For example, the board of trustees of a county agricultural high school in the state of Mississippi adopted a rule imposing athletic, library, and literary fees. The superintendent of the school was instructed to ask any student to remain from school until the payment of such fees was adjusted. A statute provided that the board of trustees "shall have full

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[1]Vincent v. County Board of Education of Talladega County, 222 Ala. 216, 131 So. 893 (1931).

[2]Wilson v. Stanford, 133 Ga. 483, 66 S.E. 258 (1909). Young v. Trustees of Fountain Inn Graded School, 64 S.C. 131, 41 S.E. 824 (1902). Claxton v. Stanford, 160 Ga. 752, 128 S.E. 887 (1925). Brewer v. Ray, 149 Ga. 596, 101 S.E. 667 (1919). Brinson v. Jackson, 168 Ga. 353, 148 S.E. 96 (1929).

[3]Claxton v. Stanford, 160 Ga. 752, 128 S.E. 887 (1925).

[4]Young v. Trustees of Fountain Inn Graded School, 64 S.C. 131, 41 S.E. 824 (1902). Morris v. Vandiver, 164 Miss. 476, 145 So. 228 (1933). See also State v. Wilson, 221 Mo. App. 9, 297 S.W. 419 (1927).

power to do all things necessary to the successful operation of such school." Following precedent, the court took the position that the powers of school boards are usually purely statutory and derivative, and that such boards have no power except those expressly conferred upon them by statute, or are necessarily implied from those conferred, or from the duties imposed upon them.

> We do not think the power broad enough to authorize the board to impose charges not specifically authorized by law, and to enforce payment by refusing permission to attend the school where students are eligible to attend. The statute providing for the support of these schools by levying a tax upon the taxable property of the county, and state aid, excludes, by implication, the power to charge other fees, or charge for attendance.[1]

Neither may school boards under such general statutes compel a resident pupil to pay a tuition fee as a condition to high school attendance when, because of failure, it is necessary for him to attend a longer time than four years. A board of education in North Dakota undertook to charge an eighteen-year-old pupil, who had not completed a high school course in four years, a tuition fee for all credits earned after his four years of attendance. A statute empowered school boards, "to adapt, alter and repeal, whenever it may deem expedient, rules and regulations for the reception, organization, grading, government and instruction of pupils, their suspension, expulsion or transfer from one school to another." Another statute provided that the public schools "shall be at all times equally free, open and accessible to all children over six and under twenty-one years of age residing in the district." In holding that a board had broad discretion under the first statute mentioned above, but that it had none under the second, the court said:

> It is one thing to pass rules and regulations for the organization, reception, government, and instruction of pupils, their suspension, expulsion, or transfer; it is another to impose a charge for school privileges. In the one case the board of education is clothed with wide discretion; in the other it has none. In the one case its acts are presumtively reasonable and proper; in the other its acts being beyond its authority, no presumtions attend. Payment for school privileges cannot be exacted from a bad or indolent pupil any more than it can from a good and industrious one.[2]

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[1] Morris v. Vandiver, 164 Miss. 476, 145 So. 228 (1933).

[2] Batty v. Board of Education of City of Williston, 269 N.W. (N.D.) 49 (1936).

Use of income derived from fees.--The determination by the courts as to whether school authorities have the power to demand the payment of incidental or matriculation fees as a condition precedent to school attendance is governed largely by the use made of the income derived from the collection of such fees. It is well established that school boards may not, even when there is statute authorizing the collection of fees, charge a fee for the purpose of lengthening the school term, for paying the salaries of teachers, or for the general support of the school.[1] For example, a school district in Alabama endeavored to charge all resident pupils an incidental fee ranging from twenty-five cents to one dollar per month, depending on the grade level. The fact was established that twenty-five cents per pupil was sufficient to provide for all incidental expenses and that all fees collected in addition to such sum was being used to pay teachers' salaries in order to prolong the term of school. Even though the electors of the district had, by majority vote, authorized the school board to charge such fees, the court held that no fee in excess of the amount necessary for incidental expenses of the school could be imposed by the district authorities.

> Of course, a rule fixing a reasonable incidental fee and requiring it to be paid on the first day of each month will be upheld by the courts. This discretion as to incidental fees which is lodged in school boards must be reasonably exercised, and a school board will not be permitted to exact a tuition from a pupil of a public school under the guise of a mere incidental fee.[2]

School authorities may, however, charge an incidental or a matriculation fee when the income derived from their collection is used for providing light and fuel and for such necessary supplies as brooms and water buckets.[3] A pupil was denied instruction in a public school in Alabama until she or her parents should pay an incidental fee of thirty-five cents per month. The court, in sustaining the action of the county board of education, admitted

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[1] Roberson v. Oliver, 189 Ala. 82, 66 So. 645 (1914). Williams v. Smith, 192 Ala. 428, 68 So. 323 (1915). Hughes v. Outlaw, 197 Ala. 452, 73 So. 16, Ann. Cas. 1918C 872 (1916).

[2] Roberson v. Oliver, 189 Ala. 82, 66 So. 645 (1914).

[3] Ryan v. Sawyer, 195 Ala. 69, 70 So. 652 (1916). Bryant v. Whisenant, 167 Ala. 325 (1910). Kennedy v. County Board of Education, 214 Ala. 349, 107 So. 907 (1926).

that the statutes relating to the public school system of the state contemplated that tuition should be absolutely free to all minors of the state, but it pointed out that a distinction should be made between tuition and an incidental fee for heating and lighting the school room. The court reasoned:

> We think, however, there is a well-defined distinction between tuition and a reasonable incidental fee for heating and lighting the schoolroom. And when the statute makes no provision for a fund for this purpose, the county boards have the right to prescribe a reasonable method for the raising and collection of this fund, and to delegate the authority to the district boards and teachers to enforce the rules. We also think that the requirement of a reasonable incidental fee for this purpose, as a condition precedent to attendance, is contemplated by the statute, in the absence of any special provision for the same. . . . .[1]

The same court has held that boards of education may, under express statutory authority, charge a library, shop, and laboratory fee in an amount determined by such board.[2]

On the other hand, it has been held that school boards may not impose a matriculation fee as a condition of admission to a public school when the constitution of the state provides that schools shall be free to the children of the state, regardless of what use is made of the income collected from such fee.

> It is immaterial for what purpose the school authorities may have desired to use the additional funds arising from matriculation fees. There is no law authorizing the collection of such fees as a condition of admission to the "common school department," or remaining there.[3]

In accordance with the above holding, the Mississippi court has held that a rule of a board of education that pupils remain from school until they make arrangements for the payment of athletic, literary, and library fees is not valid. The court pointed out that not tuition alone should be free, but that buildings and facilities should also be supported by taxation or donation.[4]

Thus, it appears that where boards of education have the power to impose an incidental fee, the proceeds therefrom must be used for incidental expenses and not for the payment of teachers'

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[1] Bryant v. Whisenant, 167 Ala. 325, 52 So. 525 (1910).

[2] Vincent v. County Board of Education of Talladega County, 222 Ala. 216, 131 So. 893 (1931).

[3] Wilson v. Stanford, 133 Ga. 483, 66 S.E. 258 (1909).

[4] Morris v. Vandiver, 164 Miss. 476, 145 So. 228 (1933).

salaries or for the general support of the regular instructional program. The courts are divided on the question of whether the payment of library and laboratory fees may be made a requirement for school attendance, but there are too few cases to establish authority on the subject.

CHAPTER XII

CONCLUSIONS

This analysis of the constitutions, statutes, and court rulings as they relate to public school attendance in the forty-eight states of the United States reveals several well established principles. That no child has an absolute right to attend school at public expense is an established fact. It is equally well established, however, that the enactment of constitutional and statute law defining the conditions under which children may attend free public schools creates a legal basis for such attendance which is as fully protected as the ownership of property. That is, when the constitution or the statutes in any state define or describe certain conditions precedent to public school attendance, children who meet these conditions may demand their right to attend the public schools of such state. When such right has been created, the courts of the state guard it as zealously as they guard vested rights in property.

Furthermore, when the people of the state, through their duly elected representatives, enact legislation designed to facilitate attendance upon public schools, children, who have met the individual qualifications imposed upon them by law, are legally entitled to all the facilities provided by such legislation. For example, children living in any school district in which transportation is provided at public expense may, if otherwise qualified, demand transportation as an aid to their school attendance when they are so situated as to come within the scope of the law. Or again, indigent pupils, meeting all other requirements for school attendance, must, when statutes so prescribe, be provided with those aids which will make school attendance possible.

Equally evident is the principle established by the courts that all legislation and all board rules and regulations must consider not only the welfare of the individual child but the welfare of all the children. In other words, no matter how profitable school attendance may be for any particular child, he may be denied the privileges of the school if his presence there is in any way

inimical to the educational progress, health, or morals of the other pupils attending the school. Thus, a pupil exposed to a communicable disease would probably profit by continued attendance at school, but his presence there may prove to be a menace to the health of the other pupils in attendance.

The conditions of public school attendance are seldom defined by constitutional provisions. While such provisions are interpreted by the courts as mandates to state legislatures, they are not interpreted as limitations upon the legislative power. In other words, the state legislature must carry out the mandates of the state constitution in making schools available to the children of the state; but it may do more. For example, under a constitutional provision which requires a state legislature to provide for the establishment of a system of free public schools for the children of the state between certain ages, a statute will be held valid although it provides that school boards may make the schools available to children whose ages are above or below the age limits prescribed in the constitutional provision.

It is not possible to make many general statements concerning statutes defining the legal basis of public school attendance. Generally speaking, statutes which prescribe details show but few important variations from state to state. For example, there is no great variation in age limits, scholarship requirements, or in conditions of transfer, where these are prescribed in detail. The greatest variation in statutes among the different states is the amount of discretion delegated to various local school authorities. Thus, while some states attempt to meet all contingencies in defining who are eligible and qualified to attend the public schools, others leave the matter entirely to the discretion of governing bodies of the several districts. Likewise, there is much of this type of variation among the various statutes defining school attendance within the same state--some factors left largely to the discretion of administrative boards, and other factors described in detail.

The practice of incorporating prescriptive details in statutes relating to school attendance may well be questioned. The large number of court decisions which do nothing more than interpret such specific details is some evidence that details are often hindrances to the efficient administration of pupil attendance. On the other hand, when discretion in any particular phase

of attendance is left to administrative boards, there are comparatively few court decisions. With the rulings in a few decisions, legal principles are established governing most of the contingencies which arise. This difference is particularly noticeable in such phases of attendance as transportation and transfer where the statutes are, as a rule, very numerous due to the common practice of defining these two phases for each of the several kinds of school corporations within the same state. In states with such legislation there has been much litigation, whereas, in the few states where the administration of transfer and transportation is left largely to administrative boards, very little litigation has been necessary.

There appears to be some evidence, however, that detailed legislation may decrease. Some states have repealed several detailed sections and have enacted in their stead a single section empowering the authorities in local school corporations with sufficient discretion to properly administer such provision as it relates to school attendance. No doubt a consolidation and re-codification of all statutes pertaining to education would hasten this tendency.

Furthermore, so rapidly has school legislation been enacted that there appears on the statute books today many conflicting provisions. Outmoded provisions have been superseded by later enactments only to be left in the codes where they cause considerable confusion. Such condition has doubtless arisen from the practice found in many states of adding to new legislation the provision that all laws, or parts of laws, in force at the time of the passage of the new act, which may be in conflict with the new provision, are repealed with the passage of such legislation. No further action is taken to remove the conflicting sections or parts of sections from the statute books, nor to point out what sections have been superseded. As a result, much litigation is necessarily concerned with the problem of determining which sections apply in particular cases and whether the later section is in conflict with the older. In all probability, a consolidation and re-codification of the statutes pertaining to schools and school attendance is the most direct remedy for removing the confusion which now arises in the administration of pupil attendance.

The authority granted by statute to administrative boards empowering them to use their discretion in formulating rules and

regulations necessary to the welfare of the school are usually upheld by the courts. Although such rules and regulations are often attacked on the ground that they constitute an illegal usurpation of legislative power by purely administrative boards, it is well established that such boards have the power to promulgate such rules and regulations as are necessary to the proper performance of the particular functions for which the school corporation was created. Such power is derived from the general police power which lies entirely with the state legislature. But when a state legislature, by its own acts, creates municipal, or quasi-municipal bodies to act as governmental agencies for the promotion of the general welfare, such agencies possess that degree of police power necessary to the proper fulfillment of the purpose for which they were created. And while the statutes may expressly grant specific police powers to these agencies, the naming of such powers neither precludes nor curtails the exercise of other necessary police powers. Thus, school boards may control the attendance upon public schools whenever, in their judgment, the safety and welfare of society make such control an "overruling necessity."

On the other hand, unless this principle of overruling necessity prevails, school boards, as a rule, do not possess the power, in the absence of express statutory authority, to formulate rules and regulations governing the attendance of pupils upon the public schools. For example, they may not, as a rule, furnish transportation, transfer pupils to another district, charge tuition of resident pupils, nor require separate attendance on the basis of race or color without express statutory authority. Furthermore, all rules and regulations of school authorities must be reasonable and free from abuse of the discretion vested in such authorities. Thus, a board rule which denies children the right to enter school immediately upon attaining the minimum school age as fixed by statute must be reasonable. Likewise, where a statute vests discretion in school boards to choose from two or more prescribed courses of action, these boards may not avoid their duty to act by refusing to exercise such discretion. For example, if a statute provides that school boards must furnish transportation to children living in remote parts of their district of residence or transfer such children to a more convenient school in another district and pay their tuition, the boards must either provide the transportation or the transfer.

Closely related to the above principle, is another which has been derived from attempts of the courts to determine whether a particular statute relating to attendance is directory or permissive, or whether it is mandatory. The usual difference in meaning between the terms "may" and "shall" does not prevail in such determination. As a rule, powers conferred upon public officers are construed as mandatory, though the language of the statute may be permissive, where the exercise of such power is necessary to protect the public interest or the rights of third persons. A statute empowering school boards to provide transportation of pupils to public schools when authorized by a favorable vote of the electors in the district, is, for example, mandatory, since its enforcement will result to the benefit of the district concerned. School authorities, therefore, have no discretion under such circumstances but to provide the transportation.

In the application of the general legal principles developed in this study, consideration should always be given to the fact that most of them have exceptions. Throughout the entire study major emphases have been placed upon general practices and the weight of judicial authority; although exceptions, wherever discovered, have been stated. All rules and exceptions considered, the constitutions, the statutes, and the court decisions of the several states furnish ample evidence that the people of the United States are determined to make attendance upon public schools conveniently available to every child, considering always the welfare of the individual child, of children generally, and of society as a whole.

APPENDIX

LIST OF CASES AFFECTING THE LEGAL BASIS OF PUBLIC SCHOOL ATTENDANCE IN THE UNITED STATES

Age

Alvord v. Inhabitants of Town of Chester, 180 Mass. 20, 61 N.E. 263 (1901).

Board of Education v. Bolton, 85 Ill. App. 92 (1899).

City of Manitowoc v. Town of Manitowoc Rapids, 285 N.W. 403 (1939).

In re Kindergarten Schools, 18 Colo. 234, 32 Pac. 422, 19 L.R.A. 469 (1893).

In re Newark School Board, 70 A. 881 (1907).

Roach v. Board of Directors, 77 Mo. 484 (1883).

Health

Abeel v. Clark, 84 Cal. 266, 24 Pac. 383 (1890).

Abney v. Fox, 250 S.W. (Tex.) 210 (1923).

Allen v. Ingalls, 182 Ark. 991, 33 S.W. (2d) 1099 (1930).

Barber v. School Board of Rochester, 82 N.H. 426, 135 A. 159 (1926).

Bissell v. Davison, 65 Conn. 183, 32 A. 348, 29 L.R.A. 251 (1894).

Blue v. Beach, 155 Ind. 121, 56 N.E. 89 (1900).

Board of Trustees v. Mc Murty, 169 Ky. 457, 184 S.W. 390 (1916).

Booth v. Board of Education of Ft. Worth Independent School Dist., 70 S.W. (2d)(Tex.) 350 (1934).

Bright v. Beard, 132 Minn. 375, 157 N.W. 501 (1916).

Burroughs v. Mortensen, 312 Ill. 163, 143 N.E. 457 (1924).

Carr v. Inhabitants of Dighton, 229 Mass. 304, 118 N.E. 525 (1918).

City of New Braunfels v. Walderschmidt, 109 Tex. 302, 207 S.W. 303 (1918).

Commonwealth v. Childs, 12 N.E. (2d)(Mass.) 814 (1938).

Commonwealth v. Green, 268 Mass. 585, 168 N.E. 101 (1929).

Commonwealth v. Smith, 9 Pa. Dist. Ct. 625 (1900).

Cram v. School Board of Manchester, 82 N.H. 495, 136 A. 263 (1927).

Duffield v. School District of Williamsport, 162 Pa. St. 476, 29 Atl. 742, 25 L.R.A. 152 (1894).

Field v. Robinson, 198 Pa. 638, 48 Atl. 873 (1901).

French v. Davidson, 77 Pac. 663, 143 Cal. 658 (1904).

Hagler v. Larner, 284 Ill. 547, 120 N.E. 575 (1918).

Hartman v. May, 168 Miss. 477, 151 So. 737, 93 A.L.R. 1408 (1934).

Hutchins v. School Committee of the Town of Durham, 137 N.C. 68, 49 S.E. 46 (1904).

Johnson v. City of Dallas, 291 S.W. (Tex.) 972 (1927).

Lee v. Marsh, 230 Pa. St. 351, 79 Atl. 564 (1911).

Martin v. Craig, 42 N.D. 213, 173 N.W. 787 (1919).

Matthews v. Board of Education, 127 Mich. 530, 86 N.W. 1036 (1901).

Mc Sween v. Board of School Trustees, 129 S.W. (Tex.) 206, 60 Tex. Civ. App. 270 (1910).

Osborn v. Russell, 64 Kan. 507, 68 P. 60 (1902).

People v. Board of Education, 234 Ill. 422, 84 N.E. 1046 (1908).

People v. Board of Education of City of Lansing, 224 Mich. 388, 195 N.W. 95 (1923).

People v. Ekerold, 211 N.Y. 386, 105 N.E. 670, Ann. Cas. 1915C 552 L.R.A. 1915D 223 (1914).

Potts v. Breen, 167 Ill. 67, 47 N.E. 81, 39 L.R.A. 152 (1897).

Sherman v. Board of Education, 165 Ga. 889, 142 S.E. 152 (1928).

Spafford v. Carlton, 238 Mass. 528, 131 N.E. 314 (1921).

Staffel v. San Antonio School Board of Education, 201 S.W. (Tex.) 413 (1918).

State v. Board of Education, 76 Ohio St. 297, 81 N.E. 568 (1907).

State v. Board of Education of Salt Lake City, 21 Utah 401, 60 P. 1013 (1900).

State v. Beil, 157 Ind. 25, 60 N.E. 672 (1901).

State v. Burdge, 95 Wis. 390, 70 N.W. 347, 37 L.R.A. 157 (1897).

State v. Cole, 220 Mo. 697, 119 S.W. 424, 22 L.R.A. (N.S.) 986 (1909).

State v. Drew, 192 A. (N.H.) 629 (1937).

State v. Martin, 204 S.W. (Ark.) 622 (1918).

State v. Partlow, 119 Wash. 316, 205 P. 420 (1922).

State v. Shorrock, 55 Wash. 208, 104 Pac. 214 (1909).

State v. Turney, 31 Ohio Cir. Ct. Rep. 222 (1909).

State v. Zimmerman, 86 Minn. 353, 90 N.W. 783, 58 L.R.A. 78, 91 Am. St. Rep. 351 (1902).

Stone v. Probst, 165 Minn. 361, 206 N.W. 642 (1925).

Streich v. Board of Education, 34 S.D. 169, 147 N.W. 779, L.R.A. 1915A. 632, Ann. Cas. 1917A 760 (1914).

Viemeister v. White, 72 N.E. 97, 179 N.Y. 235, 70 L.R.A. 796 (1904).

Vonnegut v. Baun, 206 Ind. 172, 188 N.E. 677 (1934).

Zucht v. King, 225 S.W. (Tex.) 267 (1920).

Zucht v. San Antonio School Board, 170 S.W. (Tex.) 840 (1914).

Mental Ability

Board of Education of Cleveland Heights v. State ex rel. Goldman, 47 Ohio App. 417, 191 N.E. 914 (1934).

Hines v. Board of Education of City of New York, 10 N.Y.S. (2d) 840, 170 Misc. 745 (1939).

State v. Board of Education, 169 Wis. 231, 172 N.W. 153 (1919).

Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (1893).

Scholarship

Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 102 N.E. 1095, Ann. Cas. 1915A 751 (1913).

Board of Education v. Wickham, 80 Ohio St. 137, 88 N.E. 412 (1909).

Creyhon v. Board of Education of City of Parsons, 99 Kan. 808, 163 Pac. 145 (1917).

Duncan v. Board of Education of City of Sioux Falls, 47 S.D. 154, 196 N.W. 547 (1924).

Jones v. McProud, 62 Kan. 870, 64 Pac. 602 (1901).

Race and Color

Black v. Lenderman, 246 S.W. (Ark.) 876 (1923).

Board of Education v. Tinnion, 26 Kan. 1 (1881).

Burnside v. Douglas School District No. 27, 33 Ariz. 1, 261 Pac. 629 (1927).

Cartwright v. Board of Education, 72 Kan. 629, 88 Pac. 382 (1906).

Chase v. Stephenson, 71 Ill. 383 (1874).

Chrisman v. Brookhaven, 70 Miss. 477, 12 So. 458 (1893).

Clark v. Board of Directors, 24 Ia. 266 (1866).

Claybrook v. City of Owensboro, 16 Fed. (Ky.) 297 (1883).

Cole v. Dist. Board of School Dist. No. 29, 32 Okla. 692, 123 Pa 426 (1912).

Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738 (1874).

Co. Board of Education of Meade Co. v. Bunger, 240 Ky. 155, 141 S.W. (2d) 931 (1931).

Crawford v. Kalmath Co. School Dist. No. 7, 68 Ore. 388, 137 Pac. 217, Ann. Cas. 1915C 477, 50 L.R.A. (N.S.) 147 (1913).

Crosby v. Mayfield, 133 Ky. 215, 117 S.W. 316 (1909).

Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273 (1912).

Davenport v. Cloverport, 72 Fed. (Ky.) 689 (1896).

Eubank v. Boughton, 98 Va. 499, 36 S.E. 529 (1900).

Fall v. Read, 193 Ky. 135, 238 S.W. 177 (1922).

Gong Lum v. Rice, 275 U.S. 78, 48 S. Ct. 91 (1927).

Harrison v. Riddle, 44 Ariz. 331, 36 P. (2d) 984 (1934).

Johnson v. Board of Education, 166 N.C. 468, 82 S.E. 832, L.R.A. 1915A 828 (1914).

Kaine v. Manaway, 101 Pa. St. 490 (1882).

Knox v. Board of Education, 25 Pac. 616, 45 Kan. 152 (1891).

Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765, 11 L.R.A. 828 (1891).

Lowrey v. Board of Graded School Trustees, 140 N.C. 33, 52 S.E. 267 (1905).

Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540 (1885).

Moreaux v. Grandich, 114 Miss. 560, 75 So. 434 (1917).

Mullins v. Belcher, 142 Ky. 673, 134 S.W. 1151 (1911).

Mc Farland v. Goins, 96 Miss. 67, 50 So. 493 (1909).

People v. Board of Education, 127 Ill. 613, 21 N.E. 187 (1889).

People v. Board of Education, 18 Mich. 400 (1869).

People v. Gallagher, 93 N.Y. 438, 45 Am. Rep. 232 (1883).

People v. School Board, 161 N.Y. 598, 56 N.E. 81, 48 L.R.A. 113 (1900).

Piper v. Big Pine School Dist., 193 Cal. 664, 226 Pac. 926 (1924).

Puitt v. Commissioners of Gaston Co., 94 N.C. 709, 55 Am. Rep. 638 (1886).

Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274 (1903).

Rice v. Gong Lum, 139 Miss. 760, 104 So. 105 (1925).

Roberts v. City of Boston, 5 Cush. (Mass.) 198 (1849).

Rowles v. Board of Education, 76 Kan. 361, 91 Pac. 88 (1907).

Slaughter-House Cases, 83 U.S. 74, 21 L.Ed. 408 (1872).

State v. Albritton, 98 Okla. 158, 224 P. 511 (1923).

State v. Board of Directors of School Dist. No. 16, 154 Ark. 176, 242 S.W. 545 (1922).

State v. Board of School Commissioners, 226 Ala. 62, 145 So. 575 (1933).

State v. Cantey, 2 (Hill) S.C. 614 (1835).

State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713 (1872).

State v. Treadway, 126 La. 300, 52 So. 500, 20 Ann. Cas. 1297 (1910).

State v. Wirt, 203 Ind. 121, 177 N.E. 441 (1931).

Trustees of Graded Free Colored Common Schools of City of Mayfield v. Trustees of Graded Free White Common Schools of City of Mayfield, 180 Ky. 574, 203 S.W. 520 (1918).

Tucker v. Blease, 97 S.C. 303, 81 S.E. 668, Ann. Cas. 1916C 796 (1914).

United States v. Buntin, 10 Fed. 730 (1882).

Wall v. Oyster, 36 App. Cas. (D.C.) 50, 31 L.R.A. (N.S.) 180 (1910).

Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405 (1874).

Williams v. Board of Education, 45 W.Va. 199, 31 S.E. 985 (1898).

Williams v. Board of Education, 79 Kan. 202, 99 Pac. 216, 22 L.R.A. (N.S.) 584 (1908).

Williams v. Bradford, 158 N.C. 36, 73 S.E. 154 (1911).

Residence

Anderson v. Breithbarth, 62 N.D. 709, 245 N.W. 483 (1932).

Ashley v. Board of Education, 275 Ill. 274, 114 N.E. 20 (1916).

Black v. Graham, 238 Pa. St. 381, 86 Atl. 266 (1913).

Board of Education v. Crill, 149 N.Y. App. Div. 407 (1911).

Board of Education v. Fosters, 116 Ky. 484, 76 S.W. 354, 3 Ann. Cas. 692 (1903).

Board of Education v. Hobbs, 8 Okla. 293, 56 Pac. 1052 (1899).

Commonwealth ex rel. Boyd v. School Directors, 211 Pa. 637, 61 A. 247 (1905).

Crain v. Walker, 222 Ky. App. 828, 2 S.W. (2d) 654 (1928).

Fangman v. Moyers, 8 P. (2d) 762, 90 Col. 308 (1932).

Fry v. Upper Swatara Twp. School Dist., 164 Pa. 603, 30 A. 507 (1894).

Gardner v. Board of Education, 5 N.Dak. 259, 38 N.W. 433 (1888).

Haverhill v. Gales, 103 Mass. 104 (1869).

Kidd v. Joint School Dist. No. 2, 194 Wisc. 353, 216 N.W. 499 (1928).

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